

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF THE EXECUTIVE DIRECTOR
FOR OPERATIONS

James Lieberman, Director,
Office of Enforcement

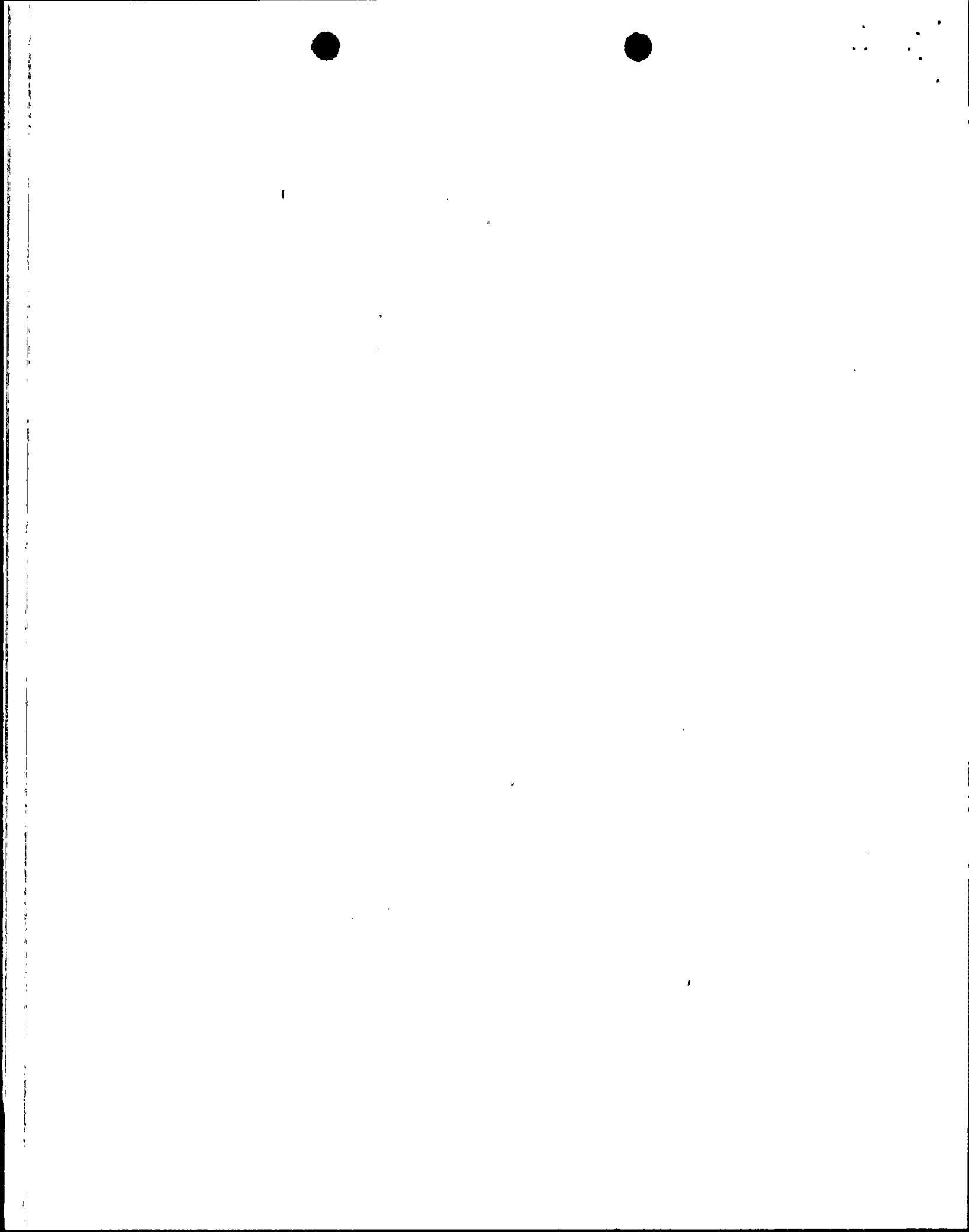
In the Matter of)	
)	Docket Nos. 50-528
ARIZONA PUBLIC SERVICE)	50-529
COMPANY, ET AL.)	50-530
)	
(Palo Verde Nuclear Generating)	(10 CFR § 2.206)
Station, Units 1, 2, and 3))	

DIRECTOR'S DECISION UNDER 10 CFR 2.206

I. INTRODUCTION

By Petition dated July 16, 1986, Mr. Myron L. Scott, Ms. Lyn McKay, and Ms. Barbara S. Bush, on behalf of the Coalition for Responsible Energy Education (CREE or Petitioner), filed a request pursuant to 10 CFR § 2.206 with the Director, Office of Inspection and Enforcement. The Petition was subsequently referred to the Office of Enforcement for response. The Petition alleges that Arizona Public Service Company, et al. (APS or Licensees), have knowingly violated the provisions of 10 CFR § 50.7 by requiring certain employees to submit to polygraph testing as a means of discouraging employees from reporting unsafe conditions at the Palo Verde Nuclear Generating Station (PVNGS or

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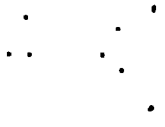


Palo Verde). In support of its claim, CREE cites the experience of an individual (Mr. Blaine Thompson) who, it contends, was intimidated and harassed by the Licensees by being required to undergo polygraph testing in retaliation for allegedly reporting certain security problems to the NRC.

As sanctions against Licensees for these alleged violations, CREE requests that the Commission: (1) impose a stringent civil penalty; (2) require the posting of notices to employees advising them of protection afforded under 10 CFR § 50.7 and the Energy Reorganization Act; (3) require the posting of notices of public apology by Licensees for the alleged violations of 10 CFR § 50.7 and the Energy Reorganization Act; and (4) deny or revoke all Palo Verde licenses.

By letter dated August 28, 1986, the Director, Office of Inspection and Enforcement, advised CREE that the Petition was under consideration. Notice of receipt of the Petition was published in the Federal Register on September 5, 1986 (51 Fed. Reg. 31857). The Director further advised CREE, regarding its request for the posting of notices advising employees of protection afforded for whistle blowing activities, that the Licensees are already currently required under 10 CFR § 50.7 to post such notice.

By letter dated November 24, 1986, the Director, Office of Inspection and Enforcement, advised CREE that a decision on its Petition would be delayed pending the outcome of the Department of Labor (DOL) proceeding regarding Mr. Blaine Thompson and to enable the Director to review the evidence, findings of fact, and conclusions of law presented in



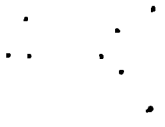
that proceeding. ^{1/} In an Order Approving Settlement dated September 17, 1987, the Secretary of Labor approved a settlement agreement entered into by Blaine Thompson, Licensees, and CREE regarding Mr. Thompson's discrimination complaint.

For the reasons set forth below, CREE's requests for imposition of a stringent civil penalty, posting of a public apology by Licensees, and denial or revocation of all Palo Verde licenses are denied. To the extent that CREE requests that Licensees be made to post, pursuant to 10 CFR § 50.7(e), notices to employees asserting the protection afforded under 10 CFR § 50.7 and the Energy Reorganization Act, its request is granted.

II. DISCUSSION

A brief discussion of the factual setting which led to the Petition is appropriate. On about February 11, 1986, the NRC commenced an unannounced inspection of the Licensees' security program at Palo Verde. On February 14, 1986, after completion of the inspection, the NRC conducted an Exit Meeting to discuss preliminary results of the inspection. On February 19, 1986, supervisors in the Licensees' security

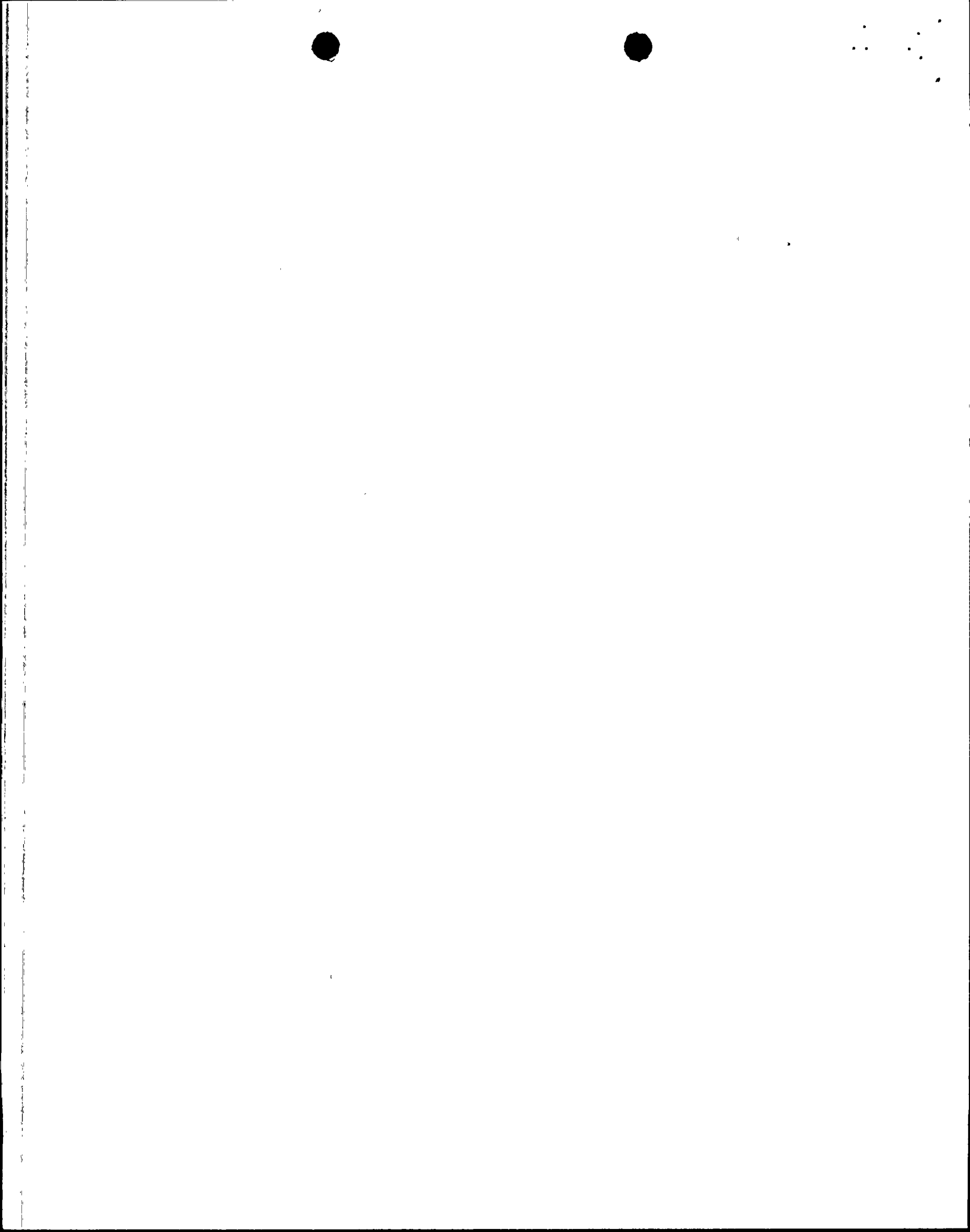
^{1/} In a memorandum of understanding, the NRC and the Department of Labor have agreed to coordinate and cooperate concerning the employee protection provisions of § 210 of the Energy Reorganization Act of 1974. Generally, when a complaint has been filed with the Department of Labor alleging discrimination by an NRC licensee, the NRC defers its consideration of the matter until the Department of Labor has acted. This policy avoids duplication of effort and the needless expense of resources by deferring NRC actions until the Department of Labor has fully considered the issues. General Electric Co. (Wilmington, North Carolina Facility), DD-86-11, 24 NRC 325, 331-332 (1986).



department were debriefed by Licensees' management regarding the NRC February 14, 1986 Exit Meeting.

On February 25, 1986, Mr. John Staggs of the Arizona Republic telephoned Licensees and the NRC regarding the February 1986 NRC security inspection at Palo Verde and questioned them concerning statements made at the Exit Meeting which apparently he had learned about from a confidential source. On February 26, 1986, an article reporting on the NRC assessment of security at Palo Verde appeared in the Arizona Republic. Although the possibility existed that Mr. Staggs had been given safeguards information, the newspaper article, itself, did not divulge any safeguards information. On February 27, 1986 through March 4, 1986, Licensees conducted polygraph examination of thirty designated individuals for the announced purpose of investigating the alleged security leak. These individuals either attended the NRC Exit Meeting or received information of the meeting from their supervisors. The examinations did not establish that any of them were responsible for providing information to Mr. Staggs.

One of Licensees' employees who was scheduled for the polygraph examination, but did not take it because of alleged health reasons, was Blaine Thompson, a captain of security at PVNGS. Allegedly for this same health problem, Licensees subsequently transferred Mr. Thompson away from PVNGS. Mr. Thompson, who had complained to the NRC about another matter in December 1985, alleged that the earlier whistle-blowing incident was the reason for the Licensees' pressuring him to submit to the polygraph examination. Another PVNGS security officer, Mike Deblo, who

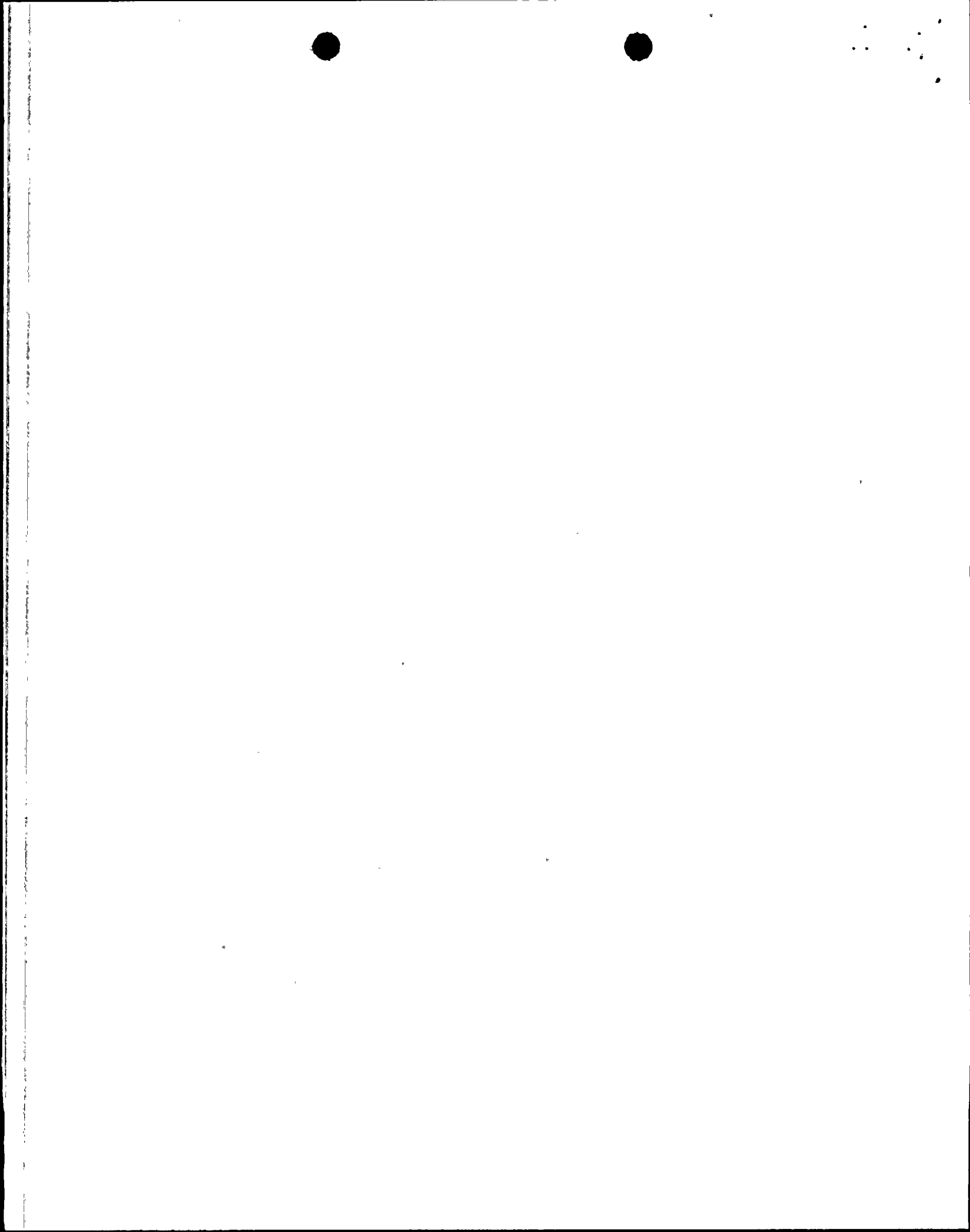


was Mr. Thompson's immediate supervisor, was demoted and transferred to another position after taking the polygraph examination.

CREE asserts, as the basis for its requests, that Licensees violated 10 CFR § 50.7 when it required selected Palo Verde workers to take polygraph examinations to identify the source of information to the local media. In support of this assertion, Petitioner claims that: 1) Licensees violated 10 CFR § 50.7 by implementing polygraph testing of plant employees as a means of retaliation for non-prohibited disclosure of negative information to the news media; 2) Licensees also implemented the polygraph testing as a means of intimidating potential whistleblowers; 3) Licensees used the polygraph testing as a means of retaliation against Blaine Thompson for having contacted the NRC in December 1985; and 4) Licensees, by their actions against Mike Deblo, violated 10 CFR § 50.7. Petitioner also contends that, as a result of the polygraph testing, a chilling effect on disclosures by workers has occurred at PVNGS which only the strongest possible sanctions can remove.

A. Polygraph Testing as a Policy Matter

At the outset it should be emphasized that no position is taken in this Decision regarding the appropriateness of polygraph testing in general. Such a finding is not required here since the issues raised by CREE are limited to whether the Licensees improperly used the polygraph testing conducted in February - March 1986 as a means to retaliate against Blaine Thompson and other employees who might have gone to the news media, and whether Licensees' use of polygraph examinations have



had the effect of discouraging workers' disclosures of safety problems such that a substantial public health and safety concern exists.

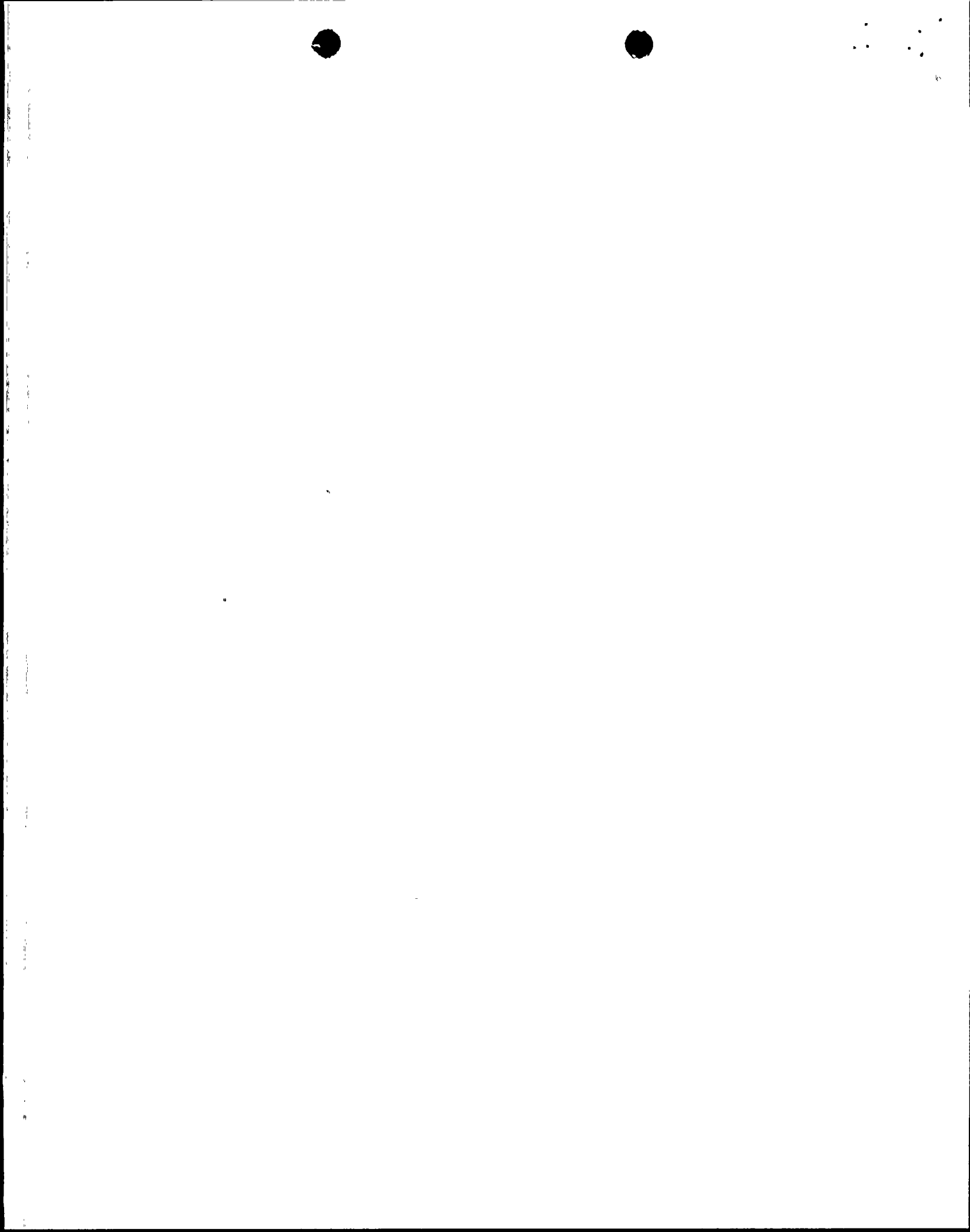
B. Violation of 10 CFR § 50.7 By Licensees

10 CFR § 50.7 prohibits an employer subject to the regulation from discharging or taking other adverse employment actions against an employee in retaliation for the employee having engaged in protected activities. The protected activities include, but are not limited to, providing information to the NRC regarding violations, requesting the NRC to institute action, or testifying in an NRC proceeding. See 10 CFR § 50.7(a). In addition, both the NRC and DOL consider the making of internal reports of safety problems to one's employer as a protected activity. Duke Power Company (Catawba, Units 1 and 2), DD-85-9, 21 NRC 1759, 1766 (1985); Smith v. NORCO, 85-ERA-17, Slip Opinion at 3 (October 2, 1987). The alleged discriminations against Blaine Thompson, Mike Deblo, and the unknown employee(s) who may have disclosed information to the news media are discussed separately.

1. The Alleged Adverse Action Against Blaine Thompson

Petitioner alleges that Licensees used the February - March 1986 polygraph examinations to retaliate against Blaine Thompson for his December 1985 contact with the NRC. Mr. Thompson also made the same allegation to the Department of Labor (DOL) on March 25, 1986. ^{2/} DOL

^{2/} See letter to Mr. Blaine Thompson from Edward D. Duncan, Director of Enforcement, DOL Wage Hour Division, Phoenix, Arizona, dated April 24, 1986.



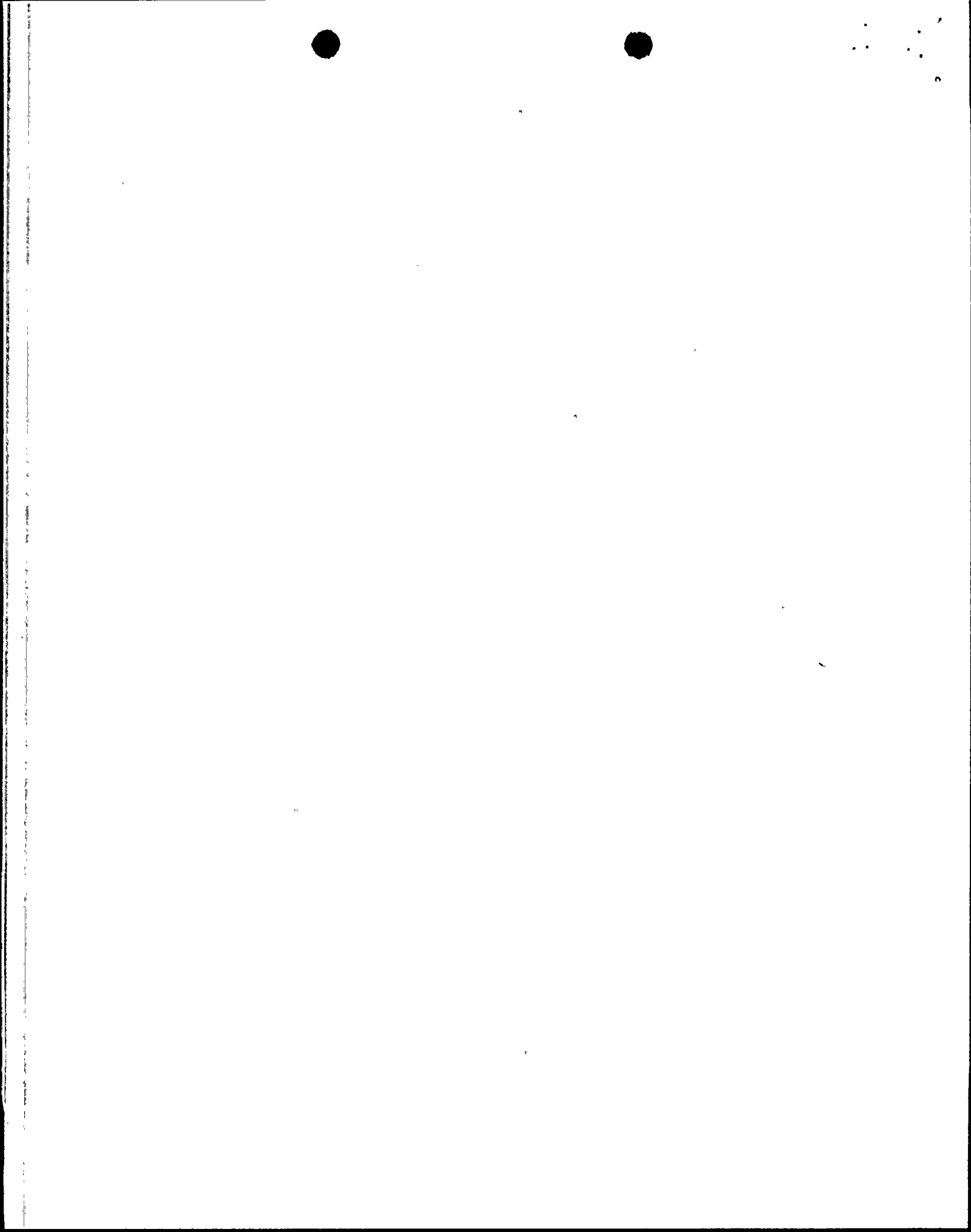
investigated this allegation and found that Mr. Thompson had engaged in protected activity by contacting the NRC, but that the Licensees had not discriminated against him, or tried to retaliate, for his engaging in this protected activity. ^{3/}

It is Licensees' position that the decision to conduct polygraph examinations was made on the evening of February 25, 1986 after having earlier received a phone call from John Staggs of the Arizona Public during which Mr. Staggs referred to security deficiencies at Palo Verde which Licensees allege indicated an unauthorized disclosure of security information. ^{4/} Licensees further contend that the NRC requested that APS investigate this possible unauthorized leak of security information which could have been a violation of NRC regulations.

CREE, on the other hand, claims that security information prohibited from disclosure by NRC regulations was never divulged to Mr. Staggs since it was not included in the February 26, 1986 Arizona Republic article. Thus, according to CREE, the Licensees' stated rationale for the polygraph tests was merely a pretext to harass Mr. Thompson and to

^{3/} See April 24, 1986 letter from Edward D. Duncan, Director of Enforcement, Department of Labor to Blaine Thompson. Mr. Thompson appealed this decision and subsequently settled his complaint in a settlement agreement approved by the Secretary of Labor on September 17, 1987. See Thompson v. Arizona Public Service Co., 86-ERA-27, Order Approving Settlement, dated September 17, 1987. CREE had become a party to this proceeding as an intervenor.

^{4/} See letter from William R. Hayden, counsel for Licensees, to James S. Green, U.S. Department of Labor, Phoenix, Arizona dated April 17, 1976. The letter from Mr. Hayden is a "statement of position" submitted on behalf of Licensees in response to Blaine Thompson's Section 210 complaint to the Department of Labor.

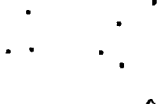


discourage other Palo Verde employees from going to the press and the NRC.

Contrary to CREE's contentions, a review of the Petition and its exhibits, the materials compiled by the DOL in its investigation, the DOL Enforcement Director's decision, ^{5/} and the discovery documents in the Blaine Thompson DOL hearing (hereinafter referred to as the record), does not support the contention that the polygraph examinations were retaliatory toward Blaine Thompson. ^{6/} Although it is true that there was no safeguards information divulged in the news article that appeared in the Arizona Republic, the record establishes that what prompted the Licensees' investigation was a possible security leak at PVNGS suggested by statements in the newspaper article and the telephone calls made by Mr. Staggs to the Licensees and the NRC. The investigation was encouraged by the NRC which had expressed concerns about this matter and had requested that an investigation be initiated by the Licensees. The record also reveals that Mr. Thompson was not singled out to be polygraphed since he was a member of one of the two main groups of employees targeted by Licensees as having had access to the information

^{5/} The DOL Enforcement Director's decision, finding that there was no discrimination against Mr. Thompson, is not binding on the NRC. However, the determinations in that decision are facts considered by us.

^{6/} In his DOL complaint, Mr. Thompson alleged various other discriminatory actions by Licensees in addition to the polygraph examination. We are not called on to judge these other incidents since CREE has limited its allegations regarding Mr. Thompson to the polygraph incident. However, our assessment of the record with respect to these other allegations is not contradicted by the DOL Enforcement Director's finding of no discrimination.

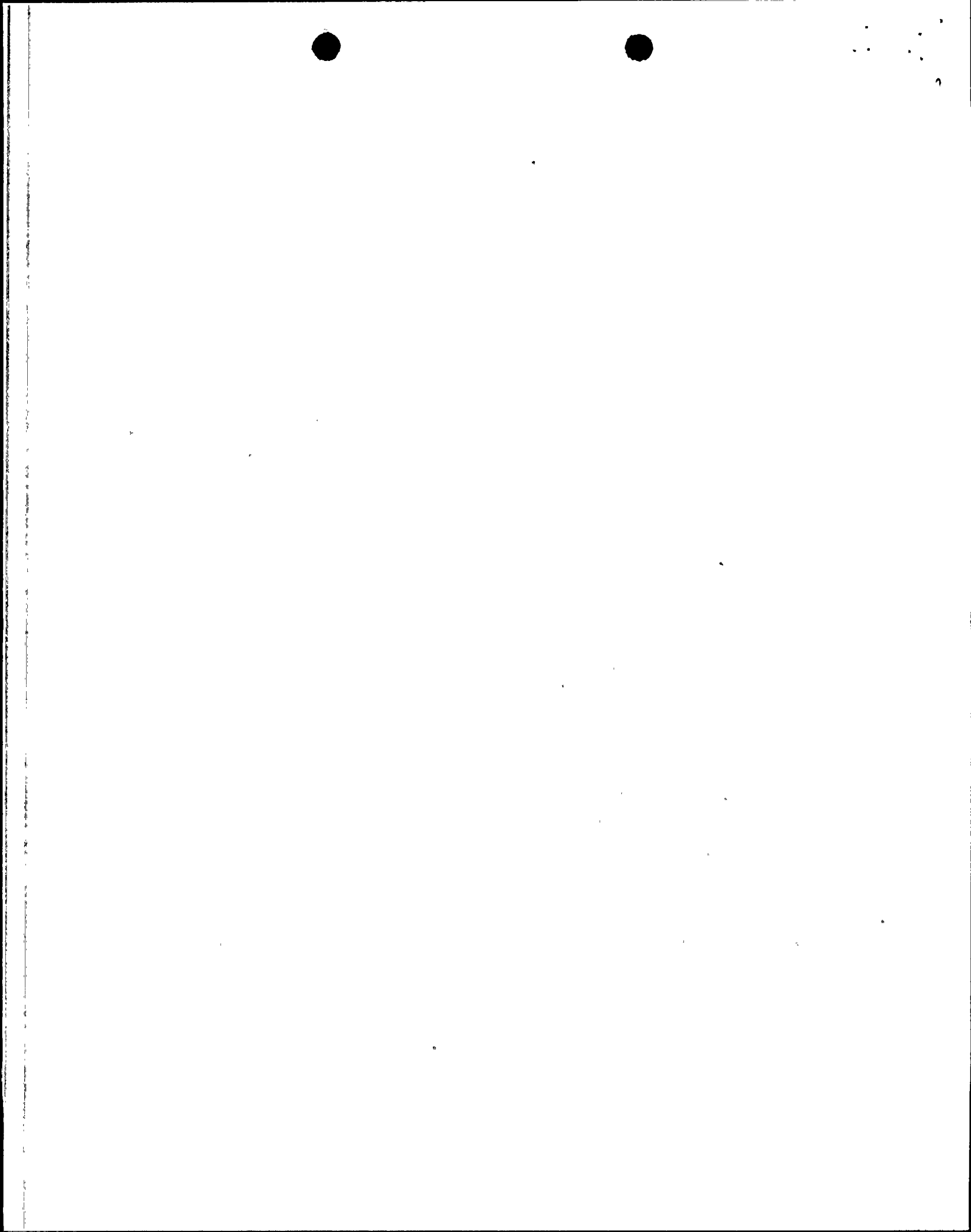


which Licensees believed had been improperly conveyed to Mr. Staggs. The first group consisted of 14 employees who attended the February 14, 1986 NRC Exit Meeting which was the subject of Mr. Staggs newspaper article. The second group was composed of eleven employees, which included Mr. Thompson, who had attended a briefing on February 19, 1986 concerning the Exit Meeting. In total, Licensees scheduled polygraph examinations for 31 individuals, 22 from those that had attended the two meetings (25 less 3 overlap employees who attended both meetings) and 9 additional employees whom the Licensees determined had access to the information in question. All of these employees, except Mr. Thompson, had polygraph examinations.

Under these circumstances, there is no adequate basis for concluding that Licensees manipulated the scope of their investigation so as to draw in Blaine Thompson in retaliation for his having contacted the NRC in December 1985. Therefore, I have concluded that Licensees' actions in administering the polygraph examinations did not discriminate against Blaine Thompson in violation of 10 CFR § 50.7.

2. The Alleged Adverse Action Against Other Employees

Turning now to the issue of the unnamed individual(s) whom CREE alleges was discriminated against by Licensees' initiating polygraph testing in retaliation for that individual(s) going to the news media, a question quite different than that in the Blaine Thompson issue is presented. CREE lays the foundation for the proposition that communicating with the news media is a protected activity. Assuming that this argument is sound, the question of whether any employee actually engaged in



protected activities must be answered. ^{7/} However, unlike the Thompson discrimination issue, here CREE has not named any individuals who engaged in the protected activity of communicating with the news media, and the record fails to identify such individuals. ^{8/}

As stated, 10 CFR § 50.7 prohibits an employer subject to the regulation from discharging or taking other adverse employment action against an employee in retaliation for the employee having engaged in protected activities. By its terms, before a violation of 10 CFR 50.7 can occur, an employee must engage in a protected activity. ^{9/} However, this essential element of proof is missing in this case since there is not identified a specific PVNGS employee engaged in protected activities by contacting the new media. Thus, CREE's allegation of a violation of 10 CFR § 50.7 must be denied. Moreover, as discussed above, the

^{7/} Even assuming for argument that under appropriate circumstances providing information to the media is a protected activity, it is clear that disclosing safeguard information to the media is prohibited and, therefore, cannot be a protected activity.

^{8/} Whether Blaine Thompson contacted the news media and whether he revealed information prohibited from disclosure by regulation remain unanswered questions. Of the 31 employees targeted by Licensees for polygraph examinations in their investigation, all but Mr. Thompson were examined. Of the 30 examined, only Mike Deblo tested "deceptive" to questions regarding his knowledge of who had released security information to unauthorized sources. See Hayden Letter, at 8-9.

^{9/} Whether or not a violation would exist if a licensee discriminated against an employee for erroneously believing the employee engaged in protected activity need not be resolved here.



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record reflects that the purpose for the examination was to investigate the suspected security leak. ^{10/}

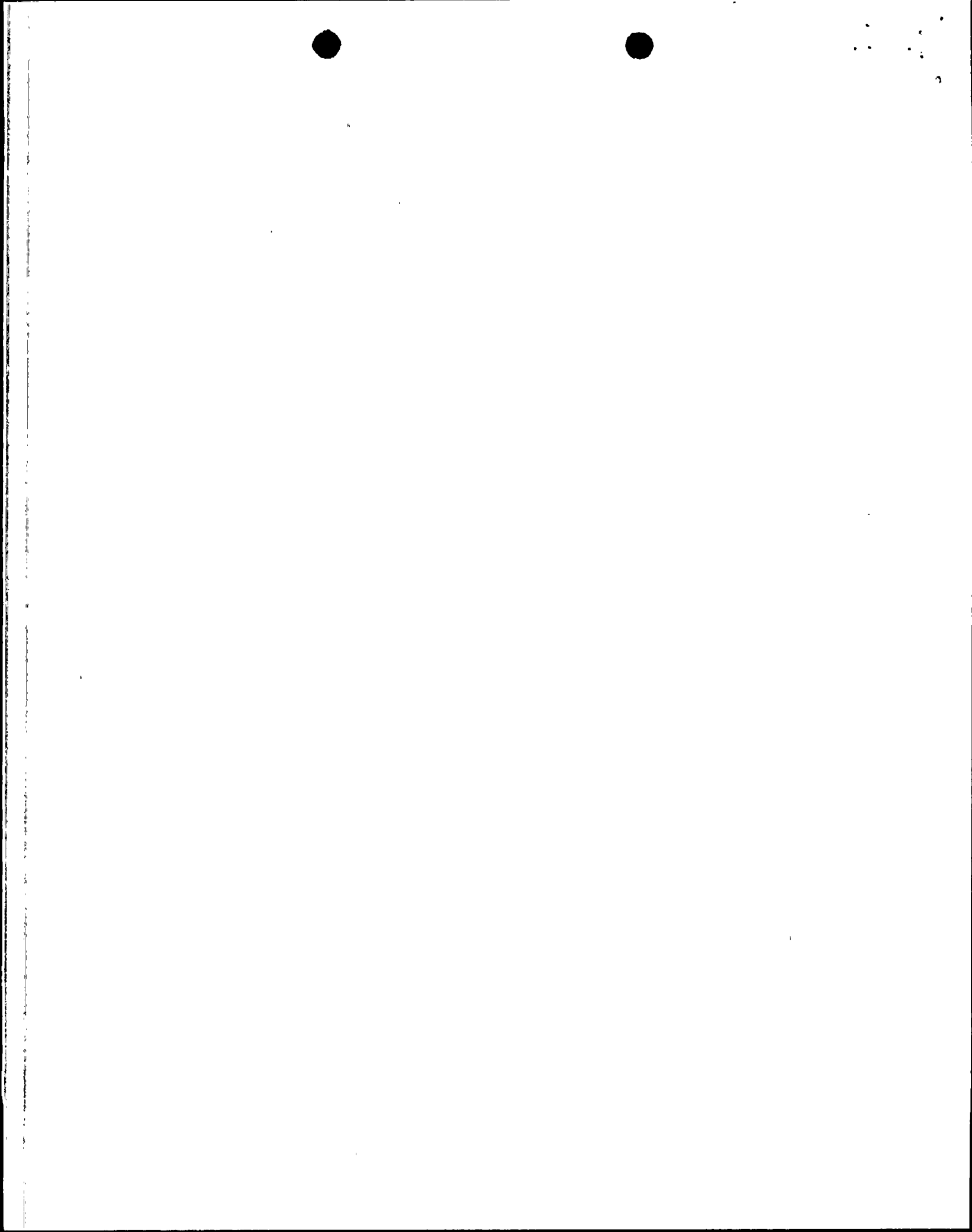
CREE's request that I find a violation of 10 CFR § 50.7 for Licensees' actions regarding Mr. Mike Deblo also must be denied. Neither the petition nor the record indicate that Mr. Deblo actually engaged in protected activity. At most, the results of the lie detector test suggested that Mr. Deblo tested "deceptive" regarding his knowledge of who released security information. Although it is undisputed that Mr. Deblo, a member of management, was demoted and later resigned, without more, I cannot conclude that he was discriminated against for engaging in protected activity. It is also noted that Mr. Deblo did not file a complaint of discrimination with the NRC or the Department of Labor.

C. The Alleged Chilling Effect At Palo Verde

CREE asserts that Licensees' polygraph examinations during the security-leak investigation had a chilling effect which discouraged the reporting of safety concerns by workers at the facility. In support of this assertion, CREE cites several instances where Licensees' employees claimed that they felt inhibited.

While the staff has no reason to question that some Licensee employees may have approached CREE with concerns regarding retaliation, the staff does not have evidence that employees were inhibited from

^{10/} Under these circumstances, I need not reach the question of whether communicating with the news media is a protected activity.



reporting safety concerns at Palo Verde. On the contrary, it is our assessment that Licensees' employees have come forward with safety concerns at about the same rate both before and after the polygraph testing. ^{11/} Moreover, NRC personnel, who were aware of these matters and who had access to information from Palo Verde workers, did not believe that any chilling effect had taken place at the plant or that workers were less likely to communicate with them as a result of the polygraph exams.

In regard to this issue, it is also significant that the Licensees, themselves, took steps to prevent any chilling effect by notifying all employees in a notice of March 24, 1986 that the company was not attempting to discourage employees from communicating about Palo Verde matters with the press. Licensees also advised employees in that notice that the company has "never, nor will we ever, utilize polygraph tests or any other means to determine the identity of employees who may have talked to the press, or any other person, regarding any company matter, with the exception of matters involving the possible unauthorized disclosure of classified security information which could threaten the security of safe operation of Palo Verde." In my view, the March 24 notice, in itself, would have done much to dispel any possible chilling effect at PVNGS caused by the polygraph examinations.

^{11/} For the one year prior to the testing, there were 25 safety concerns reported to the NRC as opposed to 21 concerns reported in the year after testing.



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D. The Posting of Notices

With respect to CREE's request for posting of notice to employees concerning protection afforded under 10 CFR § 50.7 and the Energy Reorganization Act, the NRC staff agrees with CREE. Under the terms of 10 CFR § 50.7(e), Licensees are required to post Form NRC-3, "Notice of Employees" on its premises at locations sufficient to permit employees protected by 10 CFR § 50.7 to observe a copy on the way to or from their place of work. Thus, to the extent that CREE requests that I require Licensees to comply with the posting requirements of 10 CFR § 50.7(e), its request is granted. Our inspections have found that this posting requirement is being met. Compliance with the requirement will continue to be examined, as it is for all applicable licensees, during routine inspections.

To the extent that CREE requests that I "reassert" the protection afforded by 10 CFR § 50.7 and the Energy Reorganization Act, its request is denied. CREE has not presented facts that suggest Licensees were not in compliance with the posting requirements of 10 CFR § 50.7(e), nor has CREE presented facts that suggest that NRC Form-3 is deficient in its intended purposes of advising employees regarding protection from discrimination. In addition to specifying the action requested, a petitioner under 10 CFR § 2.206 is required to set forth facts that constitute the basis for the request. 10 CFR § 2.206(a); Duke Power Co. (Catawba Nuclear Station, Units 1&2), DD-81-1, 13 NRC 45, 46 (1981).

III. CONCLUSION

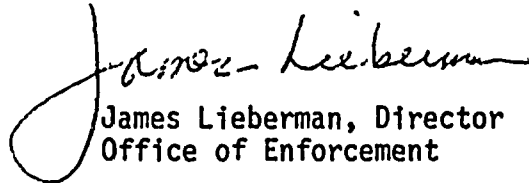
My Decision has considered CREE's contention that Licensees' use of polygraph examinations at Palo Verde in February-March 1986 violated



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10 CFR § 50.7 in that it was a means of discrimination against certain employees for having engaged in protected activities and that it discouraged other employees at Palo Verde from reporting safety concerns. Based on staff's review of the available record in this matter, I have decided that the discrimination alleged by CREE did not occur and that it is not necessary to cure any chilling effect at Palo Verde.

For the reasons stated in this Decision, CREE's requests, except for the request the Licensees post notices pursuant to 10 CFR § 50.7(e), are denied. As provided in 10 CFR § 2.206(c), a copy of this Decision will be filed with the Secretary for the Commission's review.

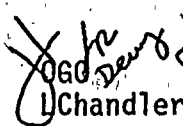

James Lieberman, Director
Office of Enforcement


Dated at Rockville, Maryland
this 15th day of June 1988

Ms. Barbara S. Bush
Ms. Lyn McKay
Mr. Myron L. Scott


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