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

In the Matter of

Grievance of

Roger A. Fortuna, Jr.

DECISION OF THIRD LEVEL OFFICIAL

Christine N. Kohl
Chairman and Chief
Administrative Judge
Atomic Safety and Licensing
Appeal Panel

December 1, 1989

UNITED STATES
NUCLEAR REGULATORY COMMISSION

In the Matter of

Grievance of
Roger A. Fortuna, Jr.

Julian S. Greenspun, attorney for the grievant, Roger A. Fortuna, Jr.

Dennis C. Dambly and Marvin L. Itzkowitz, attorneys for the agency, Nuclear Regulatory Commission.

Before Christine N. Kohl, Chairman and Chief Administrative Judge, Atomic Safety and Licensing Appeal Panel

DECISION OF THIRD LEVEL OFFICIAL

Before me is the grievance of Roger A. Fortuna, Jr., Deputy Director of the NRC's Office of Investigations (OI), from a June 22, 1989, letter of reprimand he received from James M. Taylor, Deputy Executive Director for Nuclear Reactor Regulation, Regional Operations and Research. The letter of reprimand sustains charges that Fortuna was guilty of misconduct in refusing to comply with a directive of management and refusing to cooperate in an official NRC investigation conducted by the Office of Inspector and Auditor (OIA). As explained below, I conclude that Fortuna did not categorically refuse to cooperate in the investigation; rather, he refused to cooperate in the manner directed, which the record here reflects was not in accordance with OIA practice and policy in two respects. In

the circumstances, I direct the letter of reprimand to be expunged from Fortuna's Official Personnel Folder.

I. Background

The facts are largely undisputed.[1] Apparently sometime in 1988, Douglas Ellison, a former employee at Niagara Mohawk Power Corporation's Nine Mile Point nuclear power plant in New York, contacted OIA and made several allegations against various NRC personnel, one of whom was Fortuna, in connection with an earlier OI investigation at Nine Mile Point.[2] In particular, Ellison claimed that (1) his confidentiality had been breached; (2) OI tried to discredit him; (3) no one ever advised him regarding the resolution of his allegations; and (4) Nine Mile Point, Unit 2, was licensed by the NRC while his concerns regarding falsified records were still under investigation by the

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[1] But see infra p. 7 & note 18.

The Appendix to this Decision lists all of the documents and other materials supplied by the grievant and the agency, which constitute the Official Grievance File. See NRC Manual Chapter 4157, App. § K.

[2] OI is responsible for investigating charges of wrongdoing by NRC licensees and others outside the agency. Until its abolition in April 1989, OIA was responsible for investigating allegations of wrongdoing by NRC employees. OIA's functions have now been assumed by the new, statutorily created, independent Office of the Inspector General (IG).

utility, Niagara Mohawk.[3] On November 4, 1988, the Deputy Director of OIA, Frederick Herr, and the OIA Assistant Director for Investigations, Mark E. Resner, interviewed Fortuna in connection with the Ellison allegations. This interview was not transcribed by a court reporter; Herr and Resner simply took notes.[4]

More than two months later, on January 13, 1989, Resner removed the OI file on the Ellison allegations from Fortuna's office, without the latter's permission.[5] On Thursday, January 26, Resner notified Fortuna that he was the subject of an administrative -- not criminal -- investigation and that OIA wanted to reinterview him on-the-record, in the presence of a court reporter. When Fortuna expressed a desire to have counsel present, Resner advised him that he had no right to counsel in such an administrative proceeding, but that OIA would not object to one being present. No date for the interview was set, and Fortuna indicated he would get back to Resner within the

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[3] Memorandum from H.L. Thompson to R.A. Fortuna (Feb. 9, 1989) [hereinafter, "Feb. 9 Thompson Mem."] at 1.

[4] Affidavit of Frederick Herr (Feb. [sic: Mar.] 6, 1989) [hereinafter, "Herr Affidavit"] at 3.

[5] Handwritten Memorandum of D. Lewis.

week.[6] The following Monday, January 30, Fortuna met with his counsel, Julian S. Greenspun.[7] Two days later (February 1), OIA informed Fortuna that the interview was scheduled for the next Tuesday, February 7.[8] Fortuna indicated that more time was needed, as his counsel was tied up in litigation and also required the approval of his law firm before formally taking on his case.[9] In a February 2 memorandum, Resner confirmed that the interview was still scheduled for February 7.[10] On February 6, Resner called Fortuna to confirm the interview for the next day. Fortuna returned the call and left word with an OIA secretary that he had retained counsel and probably would not attend the interview the next day,[11] a fact he later confirmed.[12]

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[6] Feb. 9 Thompson Mem. at 1; Affidavit of Mark E. Resner (Mar. 6, 1989) [hereinafter, "Resner Affidavit"] at 3-4.

[7] Affidavit of Roger A. Fortuna, Jr. (Feb. 24, 1989) [hereinafter, "Feb. 24 Fortuna Affidavit"] at 4.

[8] Feb. 9 Thompson Mem. at 1.

[9] Feb. 24 Fortuna Affidavit at 4.

[10] Memorandum from M. Resner to R.A. Fortuna (Feb. 2, 1989).

[11] Feb. 24 Fortuna Affidavit at 4; Feb. 9 Thompson Mem. at 1.

[12] Feb. 9 Thompson Mem. at 1; Resner Affidavit at 4.

OIA rescheduled the interview for February 9, stressing that the investigation was administrative in nature, not criminal, and repeating that, while Fortuna had no right to the presence of counsel, such would be permitted.[13] On February 8, Fortuna's attorney (Greenspun) contacted OIA's Herr, who reiterated that Fortuna had no right to an attorney but one may be present during the interview. In response to Greenspun's questions regarding OIA's authority to compel an employee to submit to an on-the-record interview, Herr replied that this was consistent with governing law and agency practice. Greenspun indicated he was unavailable on February 9 but was noncommittal as to when he would be available, saying only that he would get back to OIA the next week.[14]

By memorandum dated February 9, Hugh L. Thompson, Jr. -- Deputy Executive Director for Materials Safety, Safeguards and Operations Support, and the supervisor of Fortuna's immediate superior -- issued a "formal directive" to Fortuna to attend an OIA interview on February 15-16. The memorandum stated that further delays occasioned by Fortuna's counsel were unacceptable: "Given the

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[13] Memorandum from M.E. Resner to R.A. Fortuna (Feb. 7, 1989).

[14] Feb. 9 Thompson Mem. at 1-2; Herr Affidavit at 4-5.

significance of your responsibilities in this Agency and the nature of the allegations being investigated, the Agency cannot reasonably be expected to delay the investigation further." The memorandum went on to direct Fortuna "to answer whatever questions are asked of you relating to the performance of your official duties * * * on the record under oath, with a court reporter present, to ensure the most accurate account possible of the interview."[15] Fortuna was again informed that he had no right to counsel but one could be present, and that the investigation was administrative, not criminal. He was also advised that nothing he might say could be used against him in a criminal proceeding but that he could be prosecuted for perjury. Finally, Thompson stated that a failure to comply with his order would result in disciplinary action up to and including removal from the agency.[16]

In a hand-delivered letter to Thompson the following Monday, February 13, Fortuna's counsel, Greenspun, related his conversation of February 8 with Herr and stated that he

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[15] Feb. 9 Thompson Mem. at 2. Thompson had been advised by an unidentified person or persons that this manner of conducting an investigative interview "was consistent with NRC practice in matters of this sort." Affidavit of Hugh L. Thompson, Jr. (Mar. 7, 1989) [hereinafter, "Thompson Affidavit"] at 3.

[16] Feb. 9 Thompson Mem. at 2.

needed more time due to another case he was handling and the need to confer with Fortuna. He noted that Herr had declined to provide the basis for OIA's authority to question Fortuna under oath in a transcribed interview.[17] Greenspun also expressed concern that the OIA investigation was motivated by prior friction between personnel in OI and OIA, and noted his understanding that the United States Attorney did not consider Ellison's claims to have merit.[18] He stated that Fortuna was "prepared to cooperate with OIA through an interview . . . but not one which is transcribed, unless OIA has lawful authority to conduct the interview in such manner. . . ."[19] Greenspun stated further that he himself would be able to accompany his client to an interview on February 28 or during the week of March 6, and he asked for access to the OI file Resner removed on January 13 from Fortuna's office.[20] Finally, Greenspun repeated the

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[17] Letter from J.S. Greenspun to H. Thompson (Feb. 13, 1989) [hereinafter, "Feb. 13 Greenspun Letter"] at 1-2.

[18] Id. at 4, 5. According to Resner, however, "the Department of Justice had formally declined criminal prosecution." Resner Affidavit at 3. Obviously, there is a significant difference between a finding of no merit whatsoever to an allegation and a discretionary decision to forgo a criminal prosecution. This factual discrepancy need not be resolved, however, as it has no bearing on the outcome here.

[19] Feb. 13 Greenspun Letter at 5

[20] Ibid.

request he made in his conversation with Herr for a copy of the NRC's written policy on compelled interviews of agency employees, transcribed by a court reporter.[21]

The next day (February 14), Thompson sent a memorandum to Fortuna, acknowledging Greenspun's letter and providing the requested OI file. In stating that the investigation could not be delayed further, Thompson stressed the significance of Fortuna's responsibilities and the nature of the allegations being investigated. He therefore repeated his earlier directive to Fortuna to attend the OIA interview on February 15-16, or risk removal.[22]

On February 15, Herr and Resner met with Fortuna, who was accompanied by Greenspun. The meeting was transcribed by a court reporter. Resner advised Fortuna that he was required to answer questions relating to his official duties truthfully, that refusal to answer may be a basis for disciplinary action (including dismissal), and that none of his statements could be used against him in a criminal proceeding (except for perjury).[23] Herr and Resner then attempted to question Fortuna about the Ellison allegations,

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[21] Id. at 5-6.

[22] Memorandum from H.L. Thompson to R.A. Fortuna (Feb. 14, 1989).

[23] Tr. (Feb 15) at 5.

but, on advice of counsel, Fortuna refused to answer.[24] Instead, Greenspun repeatedly attempted to ascertain OIA's legal authority to interrogate persons with no right to an attorney, under oath, and in a transcribed interview. Herr responded that this manner of conducting investigations was official agency policy and practice and that he was not there "to debate . . . legal niceties."[25] As Herr put it, "It is consistent with [the] practice of OIA in conducting investigations. We do it all the time."[26] Herr emphasized that Fortuna was not compelled by subpoena to be present and cooperate, but rather pursuant to a management directive to him as an NRC employee.[27] He also stated that a transcript of the interview was necessary to assure an accurate account.[28] Greenspun replied that his client, Fortuna, would cooperate and be interviewed, but not pursuant to the procedures he questioned (i.e., no "right" to counsel, under oath, and transcribed by a court reporter) until his questions were answered.[29] Herr noted that he regarded

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[24] Id. at 17-21, 26, 29.

[25] Id. at 11-13, 15, 17, 25, 27, 28-29, 30-32.

[26] Id. at 28.

[27] Id. at 15, 22, 25, 31.

[28] Id. at 15.

[29] Id. at 13, 17-19, 21, 24, 29, 33.

Fortuna's unwillingness to answer questions as noncooperation,[30] and the meeting ended soon thereafter.

About a week later, Greenspun sent a letter to an agency attorney, Dennis C. Dambly, repeating his client's willingness to submit to an interview in which the investigators would take notes, but not one transcribed and under oath, absent a citation to the law authorizing such. In this letter, Greenspun noted that many other agencies' Inspectors General do not have the authority to compel testimony under oath. He also suggested that compelling a federal employee to appear for transcribed testimony with no right to counsel violates the Administrative Procedure Act (APA), 5 U.S.C. § 555(b), (c).[31]

The following day, February 22, Thompson notified Fortuna by letter that he was proposing his removal from federal service for misconduct -- namely, refusing to comply with a management directive (as set forth in Thompson's February 9 and 14 memoranda to Fortuna) and refusing to cooperate in an official NRC investigation.[32] Thompson st ed:

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[30] Id. at 23 24.

[31] Letter from J.S. Greenspun to D. Dambly (Feb. 21, 1989) [hereinafter, "Feb. 21 Greenspun Letter"].

[32] Letter from H.L. Thompson to R.A. Fortuna (Feb. 22, 1989) [hereinafter, "Feb. 22 Proposal to Remove"] at 1.

> this is not a question of scheduling the investigatory interview to permit the availability of interested parties. Rather, you have assented to your attorney's representation that you will not now, or in the future, answer OIA's questions on-the-record concerning the performance of your official duties until your attorney's legal questions are resolved to his satisfaction.[33]

Thompson went on to note that he could not "postpone a significant Agency investigation until such unspecified time in the future as your attorney is satisfied that the manner in which [the] NRC conducts its internal investigations is lawful."[34] Thompson emphasized that, having refused to comply with "an important, clear and legitimate management directive," Fortuna, himself a senior manager, could no longer serve the agency "effectively and credibly."[35] The letter stated further that Fortuna's conduct set a poor example for others within and outside the agency. Thompson then advised Fortuna of his rights in this disciplinary matter. He also informed him that James M. Taylor, Deputy Executive Director for Nuclear Reactor Regulation, Regional Operations and Research, would make the final determination concerning whether Fortuna should be removed from federal

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[33] Id. at 2.

[34] Ibid.

[35] Ibid.

service.[36] Finally, Thompson urged Fortuna to cooperate with OIA prior to Taylor's decision.[37]

Greenspun replied to Thompson immediately, stating that, in his view, the issue was not one of his client's refusal to cooperate, but rather one involving the authority of OIA to compel an agency employee to respond to a court-reported interrogation, on short notice and with no right to counsel. Greenspun also reminded Thompson of Fortuna's earlier, expressed willingness to respond in a note-taking interview. Construing the end of Thompson's letter as affording an alternative to removal (i.e., one last chance to cooperate), however, Fortuna agreed to submit to a court-reported interview at a time set by OIA. But Greenspun stressed that this was not a waiver of any right Fortuna might have to seek judicial review of the matter.[38]

Indeed, five days later, Fortuna filed suit in United States District Court for the District of Columbia, seeking a temporary restraining order (TRO) and preliminary injunction, enjoining the agency from compelling him to participate without the right of counsel in an

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[36] Id. at 3.

[37] Id. at 4.

[38] Letter from J.S. Greenspun to H. Thompson (Feb. 22, 1989).

on-the-record, under-oath interview with OIA investigators, and from taking further action in connection with his proposed removal.[39] After considering the agency's opposition, Fortuna's reply thereto, and the parties' oral argument, the court denied Fortuna's request for injunctive relief, finding that he had failed to demonstrate irreparable harm. Specifically, the court concluded that the "dispute over 'no right to counsel' [had] been resolved," inasmuch as the parties had agreed that Fortuna may be represented when questioned. The court also noted that, "if plaintiff's removal is improper, plaintiff has an adequate remedy" -- presumably, through the agency's grievance process.[40]

In the meantime, the responsibility for conducting the agency's investigation of Ellison's allegations against Fortuna was transferred from OIA and delegated to Alan S. Rosenthal, a part-time administrative judge at the NRC and retired Chairman of the Atomic Safety and Licensing Appeal Panel.[41] Again, without waiving his right to judicial

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[39] Fortuna v. NRC, No. 89-0513 (D.D.C. filed Feb. 27, 1989).

[40] Id. (Mar. 21, 1989) (order denying preliminary injunction at 3).

[41] Letter from J.M. Taylor to J.S. Greenspun (Mar. 8, 1989) [hereinafter, "Mar. 8 Taylor Letter"].

review, Fortuna voluntarily agreed to an on-the-record interview with Judge Rosenthal,[42] which took place on March 22.[43] Taylor -- the agency official who would ultimately decide what disciplinary action to take against Fortuna -- advised Fortuna's lawyer, however, that the adverse action proposed in Thompson's February 22 letter was "based solely upon Mr. Fortuna's refusal to comply with an important, clear and legitimate management directive and refusal to cooperate in an official NRC investigation" and "does not depend on the outcome of the [Rosenthal] investigation."[44]

Greenspun initially sent a brief response to Taylor, asserting that the circumstances leading to the proposed adverse action against Fortuna arose as a result of the OIA investigators acting "contrary to OIA's own policies."[45] Greenspun also made and elaborated upon similar assertions in a letter to Judge Rosenthal. He referred, in particular, to a videotaped speech by then OIA Director Sharon Connelly

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[42] Letter from J.S. Greenspun to J.M. Taylor (Mar. 14, 1989) [hereinafter, "Mar. 14 Greenspun to Taylor Letter"].

[43] Letter from J.S. Greenspun to J.M. Taylor (Mar. 29, 1989) [hereinafter, "Mar. 29 Response"] at 2, 10.

[44] Mar. 8 Taylor Letter.

[45] Mar. 14 Greenspun to Taylor Letter.

to NRC personnel in the Dallas area concerning OIA's investigatory policies and practices.[46]

In a rambling, formal reply to the February 22 notice of proposed removal, Fortuna (through his counsel) made essentially four principal arguments. First, he asserted that there was no misconduct on his part because he, in fact, did not refuse to cooperate or obstinately refuse to obey an order. Fortuna noted in this regard that he had always agreed to a note-taking interview and eventually had voluntarily submitted to an on-the-record interview with Judge Rosenthal. He also argued that, in reasonably questioning OIA's authority to compel him to testify under oath, he was simply exercising a statutory right to appeal such order.[47]

Second, Fortuna contended that OIA's tactics were contrary to OIA's own policies, as well as fundamental fairness.[48] For instance, according to Fortuna, OIA went out of its way to prevent him from obtaining and having meaningful assistance of counsel, in order to put him at a

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[46] Letter from J.S. Greenspun to A.S. Rosenthal (Mar. 14, 1989).

[47] Mar. 29 Response at 1-2, 4, 6, 7, 10-11, 12, 14-16, 17.

[48] Id. at 2, 4, 5, 9, 10 & n.3, 16 n.5, 18.

disadvantage;[49] the OIA investigators refused to identify or explain the basis of their authority to compel on-the-record under-oath testimony, when requested repeatedly by Fortuna's counsel;[50] and they never gave Fortuna the option of testifying without taking an oath -- indeed, Thompson's February 9 directive ordered the interview to be under oath and transcribed by a court reporter.[51]

Third, Fortuna argued that OIA, in fact, does not have the authority to compel testimony from agency employees.[52] He pointed out that, in the agency's opposition to his motion for a preliminary injunction from the district court, the agency claimed its authority to interrogate Fortuna could be found in section 161c of the Atomic Energy Act of 1954, as amended (AEA), which authorizes the NRC to conduct investigations, administer oaths and affirmations, and subpoena persons to testify and to produce documents.[53] Fortuna claimed, however, that AEA section 181[54] makes the Administrative Procedure Act's (APA) rights to counsel and

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[49] Id. at 2, 9, 10, 17-18.

[50] Id. at 5, 6, 7, 11.

[51] Id. at 6 n.1, 16 n.5.

[52] Id. at 7, 12 n.4, 16.

[53] 42 U.S.C. § 2201c.

[54] Id. § 2231.

judicial review[55] applicable to any action taken pursuant to AEA section 161c. Thus, he argued, if the source of OIA's authority is AEA section 161, then he should have been afforded the rights attendant thereto.[56]

Fortuna's fourth principal argument in response to the proposed adverse action was that the OIA investigation was undertaken in bad faith and motivated by personal revenge for Fortuna's past testimony on behalf of OIA employees against OIA management in several discrimination and personnel grievance cases.[57] He also contended that OIA's purpose in compelling him to submit on short notice to a court-reported under-oath interview, rather than one by note-taking, was to obtain statements from him that might conflict with assertedly illegal evidence OIA had obtained -- namely, recordings of Fortuna's telephone calls one or two years before with an anti-nuclear activist named Stephen Comley, which Ellison (the informant) had taped without Fortuna's knowledge.[58]

On the same day that Fortuna submitted his formal written response to the notice of proposed adverse action

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[55] 5 U.S.C. §§ 555, 702.

[56] Mar. 29 Response at 7-9.

[57] Id. at 3, 5, 18-19.

[58] Id. at 2, 17, 20-21.

(March 29), he and his counsel met with Taylor, agency attorney Dambly, and Michael Fox, Chief of the NRC's Labor Relations Branch. Taylor characterized the meeting, which was transcribed, as an informal, "coming-together" to discuss solely the proposed personnel action against Fortuna, not the underlying OIA investigation.[59] At the meeting, Greenspun essentially reiterated the same arguments made in the formal response on Fortuna's behalf,[60] and Fortuna himself complained that OIA's tactics were neither fair nor consistent with OIA's publicly-stated policy.[61] In response to questioning, Greenspun took issue with the suggestion that he had expected OIA to "convince" him that it had authority to compel an employee to testify under oath and on-the-record without benefit of counsel; instead, he claimed he only sought a "citation" to that authority (e.g., a regulation or statute).[62] He added:

> I have to say that if this thing was handled reasonably, and they were willing to comply with their own policies, and it wasn't under these very oppressive circumstances, that I would have said, "Yes, sure. We'll come in." But it wasn't presented that way to us.[63]

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[59] Tr. (Mar. 29, 1989) at 2.

[60] Id. at 3-28.

[61] Id. at 31-37.

[62] Id. at 39.

[63] Id. at 39-40.

After reviewing the record, Taylor concluded that the charges of misconduct against Fortuna were sustained and that Thompson's proposed action to remove him from federal service was proper at the time. But because Fortuna ultimately provided an on-the-record interview (to Judge Rosenthal), was faced with possible removal for an extended period of time (four months), and has served the federal government for many years, Taylor reduced the proposed penalty to a letter of reprimand to remain in Fortuna's Official Personnel Folder for 18 months. Taylor nevertheless emphasized the seriousness of Fortuna's conduct as a member of the Senior Executive Service (SES). Taylor also advised Fortuna of his grievance appeal rights under NRC Manual Chapter 4157.[64]

Fortuna promptly filed the instant grievance with Victor Stello, Executive Director for Operations and the appropriate grievance official under NRC Manual Chapter 4157.[65] Incorporating and relying on primarily his formal

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[64] Letter from J.M. Taylor to R.A. Fortuna (Jun. 22, 1989) [hereinafter, "Letter of Reprimand"].

[65] See NRC Manual Chapter 4157, ¶¶ 043, 045. Ordinarily, there are three levels of review possible for a grievance, and the third level official is the one who issues the final agency decision. In this case, however, because "the appropriate first level official is the Executive Director for Operations . . ., there is no second or third level official; and the first level official will
(Footnote Continued)

written response to the notice of proposed removal and the transcript of the March 29 meeting with Taylor, Fortuna argued that "the reprimand is improper, is part and parcel of prohibited personnel practices, and should be withdrawn or expunged." Specifically, he claimed that "the order to testify under oath was an illegal order," and that he "did not refuse to cooperate and timely filed an appeal to the U.S. District Court of that order [i.e., the order to testify]," as was his asserted right.[66] Fortuna also alleged that the agency engaged in prohibited personnel practices in an effort "to dispose of" him. He stated that a May 23, 1989, letter to former NRC Chairman Lando Zech from Rep. Philip R. Sharp, Chairman of the House Subcommittee on Energy and Power, and an accompanying subcommittee staff memorandum disclose that Stello was "intimately involved in the conduct leading up to the Proposed Notice of Removal."[67] Because Fortuna therefore perceived Stello to "have a serious conflict of interest in objectively and impartially evaluating this grievance," he requested that his grievance be transferred for disposition

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(Footnote Continued)
perform the functions of the third level official. . . ." Id., App. § F.2.a.

[66] Letter from J.S. Greenspun to V. Stello (Jun. 27, 1989) [hereinafter, "Jun. 27 Grievance"] at 1.

[67] See infra note 85.

to the FBI (Internal Affairs Division) or the Office of Professional Responsibility at the Department of Justice.[68] In response, Stello delegated me the responsibility for deciding this grievance. Thus, my decision is that of the third level official and constitutes the final agency decision in this matter.[69]

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[68] Jun. 27 Grievance at 2.

[69] Memorandum from V. Stello, Jr., to C.N. Kohl (Jun. 29, 1989). See supra note 65.

Fortuna has repeatedly requested me to recuse myself and/or to transfer this grievance matter to another agency, such as the FBI or the Department of Justice's Office of Professional Responsibility. In this regard, he expresses concern about my ability to evaluate this grievance objectively and independently, inasmuch as he argues, by way of a defense to the charges against him, that other senior agency personnel were themselves engaged in misconduct directed at him. He suggests that I may be subject to their influence. See Letters from J.S. Greenspun to C.N. Kohl (Jul. 10, Aug. 1, Aug. 16, and Oct. 4, 1989).

Fortuna's requests are denied. He provides no basis for my recusal, save his concern about my organizational independence vel non. As he correctly notes, I do not have "the independence and lifetime appointment of an Article III judge." Letter from J.S. Greenspun to C.N. Kohl (Aug. 1, 1989) at 2. On the other hand, I know of no grievance adjudicator anywhere who has Article III status. Insofar as the NRC is concerned, however, reference to the agency's organization chart and NRC Manual Chapter 0107, ¶ 011, reveals that, as Chairman of the Atomic Safety and Licensing Appeal Panel, I report directly and solely to the Commission. Except for necessary and minimal administrative support (i.e., facilities, supplies, etc.), the Appeal Panel is wholly independent of any other NRC office and does not even receive day-to-day supervision from the Commission itself -- as must be the case given the Panel's role as an impartial adjudicator of factual and legal disputes in

(Footnote Continued)

Under NRC grievance procedures, a grievant may request within a specified time period either a personal presentation to the third level official or a hearing before a grievance review examiner.[70] Fortuna elected "not [to] request a personal hearing," referring to his "already substantial" legal costs and the extensive written and personal presentations to Taylor.[71] Although I had, nevertheless, the option of appointing a grievance review examiner,[72] I chose instead to afford both Fortuna and the agency an opportunity to present written argument in supplementation of the existing documentary record.[73]

Both parties have taken full advantage of that opportunity. Although the procedure I established contemplated a more orderly presentation oriented toward the optional and parsimonious use of both parties' resources,[74]

(Footnote Continued)
agency licensing proceedings. As for Fortuna's requests to transfer this matter to another agency, he cites no legal authority for such an extraordinary action.

[70] NRC Manual Chapter 4157, App. § I.4.b.

[71] Letter from J.S. Greenspun to C. Kohl (Jul. 10, 1989) [hereinafter, "Jul. 10 Letter"] at 1.

[72] See NRC Manual Chapter 4157, App. § I.5.c.

[73] Letter from C.N. Kohl to J.S. Greenspun and D.C. Dambly (Jul. 31, 1989).

[74] See, e.g., Letter from C.N. Kohl to J.S. Greenspun and D.C. Dambly (Jul. 31, 1989).

Fortuna (through his counsel) has submitted a proliferation of letters (some lengthy and accompanied by attachments), containing his shotgun arguments in support of the grievance.[75] The substance of these letters, however, essentially boils down to the same basic arguments pressed in his March 29 Response to the notice of proposed removal.[76]

The agency's position is set forth in a 72-page brief, and the principal points can be summarized as follows. Agency employees may be required by their superiors to cooperate in agency investigations. Thus, Thompson's directive was a legitimate exercise of management's authority.[77] If an employee objects to such an order, he or she must nonetheless obey the order, but may grieve it later. The limited exceptions to this rule -- e.g., where obeying the order would place the employee in physical danger or would require the employee to commit an illegal act -- do not pertain in this case.[78] Nor did the prior friction between Fortuna's office (OI) and OIA relieve him

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[75] See Letters from J.S. Greenspun to C.N. Kohl (Jul. 10, Aug. 1, Aug. 16, Aug. 18, Sept. 6, and Oct. 13, 1989).

[76] See supra pp. 15-17.

[77] Brief for the Agency (Sept. 22, 1989) [hereinafter, "Agency Brief"] at 4-6, 50.

[78] Id. at 15-23.

of his obligation to comply with Thompson's order to cooperate with the OIA investigators.[79] Further, OIA followed clearly lawful procedures. As the subject of an administrative investigation, Fortuna had no right to the presence of counsel during the interview, but he nonetheless was given ample opportunity to obtain counsel who was, in fact, present when OIA unsuccessfully sought to question him.[80] On-the-record interviews are the most accurate way of conducting an investigation and are fully consistent with agency practice and policy.[81] Lastly, the agency is authorized by the Atomic Energy Act to compel employees to testify under oath;[82] but even without such statutory authority, an agency may, by policy, require witnesses to testify under oath.[83] In light of these arguments, the agency therefore urges denial of Fortuna's grievance.

II. Analysis

Much of the factual and legal argument made by both Fortuna and the agency is extraneous and irrelevant to the narrow issues before me in this personnel grievance

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[79] Id. at 26-27.

[80] Id. at 30-41.

[81] Id. at 28-30.

[82] Id. at 45-47.

[83] Id. at 47-53.

action.[84] The issue here is not whether the commencement of the underlying investigation of Ellison's allegations concerning Fortuna was warranted, whether those allegations raised significant safety issues, or whether the investigation may have been improperly motivated. Others within and outside the NRC are conducting or have completed inquiries into those matters.[85] Rather, the key issues are (1) whether Fortuna's refusal to answer OIA investigators' questions under oath and on-the-record at a February 15 interview was, in fact, a refusal to comply with a management directive and to cooperate in an investigation, and (2) if so, whether such conduct was reasonably justified in the circumstances of that interview.

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[84] See, e.g., Attachments to Letter from J.S. Greenspun to C.N. Kohl (Oct. 13, 1989); Agency Brief at 8-13.

[85] For example, Fortuna has supplied (1) a May 23, 1989, memorandum prepared by the staff of the House of Representatives Subcommittee on Energy and Power, and (2) a Senate committee report, Senate Comm. on Governmental Affairs, 101st Cong., 1st Sess., Serious Problems Continue in the Nuclear Regulatory Commission's Internal Investigations (Comm. Print 1989). Inasmuch as both documents concern primarily matters beyond the proper, limited scope of this grievance, and because, in any event, I do not have the underlying source materials on which the conclusions of those documents are based, my decision does not rely on either document.

Federal employees are clearly obliged to obey the orders of their superiors and may only challenge such orders later through appropriate administrative and/or judicial proceedings.[86] There are, however, a few recognized exceptions to this well established "obey now, grieve later" rule -- e.g., when obeying the order would subject the employee to physical danger;[87] when the order directs the employee to commit an illegal act;[88] and when the order is clearly invalid as the result of a prior adjudicatory determination.[89] Federal employees are also obliged to cooperate in internal agency investigations concerning work-related conduct.[90] There is no right to remain silent in response to the questioning of internal investigators in a noncriminal, administrative case, provided that the employee has been advised both that he or she may be subject

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[86] See, e.g., Bigelow v. Dep't of Health and Human Services, 750 F.2d 962, 965-66 (Fed. Cir. 1984).

[87] Daniel v. United States Postal Serv., 16 MSPR 486, 488 (1983).

[88] Cf. Garcia v. NLRB, 785 F.2d 807 (9th Cir. 1986) (it is contrary to public policy to punish an employee for refusing to obey an employer's order to break the law).

[89] Gragg v. Dep't of the Air Force, 24 MSPR 506, 509-10 (1984).

[90] As the Supreme Court stated in O'Connor v. Ortega, 480 U.S. 709, 724 (1987), "public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner."

to discharge for failing to answer, and that the employee's answers cannot be used against him or her in a criminal proceeding.[91]

Rulings in other cases, however, seemingly conflict or "compete" with these principles of federal employment law. For example, it is beyond cavil that agency investigators must "'scrupulously'" follow their own proper procedures, even where those procedures "'are generous beyond the requirements that bind [the] agency.'"[92] In at least one case where an agency's order compelling an employee to do something violated the agency's regulations, Haisten v. Department of the Air Force, the agency's decision to terminate the employee for insubordination and failure to comply with the order was overturned.[93] And in Brown v.

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[91] Kalkines v. United States, 473 F.2d 1391, 1393 (Ct. Cl. 1973); Haine v. Dep't of the Navy, No. DC07528810350 (MSPB Aug. 9, 1989) (Westlaw, FLB-MSPB, p. 6); Weston v. Dep't of Hous. and Urban Dev., 13 MSPB 23, 24-25 (1983), aff'd, 724 F.2d 943 (Fed. Cir. 1983); Ashford v. Dep't of Justice, 6 MSPB 389, 392-93 (1981).

[92] Connelly v. Nitze, 401 F.2d 416, 423 (D.C. Cir. 1968) (citing Vitarelli v. Seaton, 359 U.S. 535, 546-47 (1959)). Accord Daniel, 16 MSPR at 488-89.

[93] 7 MSPB 158, 163 (1981). At issue in Haisten was an order directing an employee to report for a psychiatric interview. The employee successfully argued that under agency regulations she could be "referred" for such an interview, but not "ordered." The Merit Systems Protection Board specifically noted that, while the employee failed to appear at the psychiatric evaluation, she had offered on

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Department of Justice, the Merit Systems Protection Board (MSPB) determined that an employee's failure to cooperate in an internal investigation should not be viewed in a vacuum: i.e., it is appropriate for a grievance adjudicator to consider whether the employee's conduct "was reasonable under the circumstances."[94] In affirming the part of an initial decision that dismissed a charge of noncooperation, the MSPB in Brown stressed that the employee's refusal to cooperate did not occur over a prolonged period, and it was occasioned by the agency's failure to explain the subject of the investigation and to provide the employee sufficient time to retain counsel. Significantly, the MSPB was not influenced by the fact that the agency was not even obliged to inform the employee of (i) the charges against him or (ii) the employee's absence of a right to counsel.[95] Fortuna's conduct in response to Thompson's directive to

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(Footnote Continued)
several occasions to submit to a fitness-for-duty examination, which was required by the agency's regulations. Id. at 163 n.30.

[94] 20 MSPR 524, 526 (1984).

[95] Ibid. It is also noteworthy that the Brown decision was rendered subsequent to Weston, supra note 91, the strongest precedent upholding the removal of an employee for refusing to cooperate in an internal agency investigation. The cases are easily reconciled, however. In contrast to Brown, Weston involved repeated refusals to cooperate over a two-year period, and there was no indication that the agency's investigation was other than "by the book." 13 MSPB at 25-26.

cooperate with OIA, and the resulting reprimand, must therefore be judged within the context of these varied decisions.

It should be noted at the outset that the "obey now, grieve later" rule is largely inapposite here. Fortuna eventually -- albeit "voluntarily" and not at the time ordered by Thompson's directive -- did obey and cooperate in the investigation by giving an on-the-record interview to Judge Rosenthal,[96] and Fortuna is now subsequently grieving here both the original order and the reprimand that resulted from his asserted failure to obey that order when it was first given. Thus, on the one hand, the rule does not quite fit this circumstance of "delayed obedience," while on the other, it has effectively been satisfied.

Be that as it may, this much is clear: Fortuna does not qualify for any of the recognized exceptions to the "obey now, grieve later" rule. Thompson's directive did not subject Fortuna to physical danger or require Fortuna to commit an illegal act.[97] Nor was any aspect of the order

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[96] See supra p. 14.

[97] In a rather strained attempt to bring his client within the Garcia exception, supra note 88, Fortuna's counsel appears to invoke an exception to the Doctrine of Superior Orders by analogizing this case to both the Watergate scandal and the war crimes of Nazi Germany. See Mar. 29 Response at 11; Tr. (Mar. 29) at 21-23. Not

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clearly invalid as the consequence of a prior judicial ruling. Moreover, Fortuna was clearly advised both that he could be discharged for failing to answer the investigators' questions, and that his answers could not be used against him in a criminal proceeding (except for perjury).[98] He therefore was not entitled to remain silent during the questioning.[99]

Fortuna, however, did not remain totally silent or categorically refuse to cooperate in the investigation. Both before and during the February 15 interview, Fortuna's counsel indicated that his client was willing to submit to a "note-taking" interview and, further, was willing to submit to an on-the-record, under-oath interview if OIA supplied

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only is this line of argument grossly exaggerated and inappropriate (some might say offensive), it is far off the mark.

Fortuna's counsel confuses an order that may be legally invalid (i.e., one issued without proper authorization or not in accordance with proper procedures) with an order that commands one to perform an illegal and immoral act. Hence, even assuming arguendo that Thompson's directive was legally deficient in some respect and was therefore invalid, in directing Fortuna to cooperate in an investigation, to take an oath, and to submit to a transcribed interview, it most assuredly did not command him to perform any illegal act.

[98] Tr. (Feb. 15) at 5.

[99] See supra pp. 26-27 & note 91.

its authority to compel such.[100] And, as previously noted, Fortuna had already given OIA investigators one interview in November 1988 and eventually agreed to an on-the-record interview with Judge Rosenthal in March 1989.[101] Thus, Fortuna's conduct can be fairly characterized as a temporary or conditional refusal to cooperate, not unlike that in Brown v. Department of Justice, discussed above. Although that case involved only a two-day period of noncooperation, its significance lies in the fact that the MSPB was willing to consider the circumstances surrounding the employee's refusal to cooperate and upheld a presiding officer's dismissal of that charge on the ground that the employee's conduct was reasonable.[102] As the MSPB succinctly stated, "The issue is . . . whether [the employee] was non-cooperative under the particular circumstances of his case."[103] So too, then, it is appropriate here to consider

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[100] Feb. 13 Greenspun Letter at 5-6; Tr. (Feb. 15) at 11-13, 15, 17-19, 21, 24, 25, 27, 28-29, 33. See also Feb. 21 Greenspun Letter.

[101] See supra pp. 3, 14.

[102] 20 MSPR at 525-26.

[103] Id. at 526 (emphasis added). The consideration of "the particular circumstances" of the case for the purpose

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the circumstances surrounding Fortuna's temporary or conditional refusal to cooperate.[104]

Chief among the circumstances surrounding Fortuna's refusal to cooperate in the manner directed is his claim that the OIA investigators did not comply with either the law or OIA's own established policies and practices in three respects. First, Fortuna contends that he had a "right" to

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of determining whether an employee has engaged in misconduct must be distinguished from consideration of the surrounding circumstances for the purpose of setting the penalty once misconduct has been established. The agency correctly points out (Agency Brief at 70-71) that, where an SES employee (like Fortuna) is found to have engaged in misconduct, the agency need not consider the so-called penalty mitigation factors applicable to non-SES employees set forth in Douglas v. Veterans Admin., 5 MSPB 313, 331-32 (1981). Berube v. General Services Admin., 820 F.2d 396, 400 (Fed. Cir. 1987). Berube is, of course, inapposite if there is found to be no misconduct by the SES employee, given the totality of the circumstances.

[104] A recent MSPB case not cited by either the agency or Fortuna appears to take a more stringent view of an employee's refusal to cooperate than Brown. In Haine v. Dep't of the Navy, supra note 91, the employee answered some questions, but refused to answer others unless the investigators first identified the person who initiated the complaint against him. WestLaw p. 3. The MSPB applies the rule of Kalkines and Ashford, supra note 91, strictly in upholding the agency's discipline of the employee for refusing to cooperate in the investigation. Haine, WestLaw pp. 6-7. The Board makes no mention of the circumstances surrounding the refusal to cooperate and does not cite Brown, perhaps because, unlike here, the employee may not have relied upon it. In any event, the cases are factually distinguishable. Haine's refusal to answer certain questions was more categorical and substantive, whereas Fortuna temporarily refused to answer pursuant to the procedures ordered by Thompson at OIA's urging -- i.e., under oath and before a court reporter.

counsel during the investigative interview, as guaranteed by the Atomic Energy Act and the APA. He also questions OIA's authority to compel testimony under oath and transcribed by a court reporter. With regard to these latter respects, Fortuna argues further that compelling testimony in this manner is inconsistent with OIA's internal Handbook as well as public statements by NRC officials.[105]

A. The "right" to counsel. The agency has repeatedly relied on Ashford v. Department of Justice[106] as support for its argument that Fortuna had no right to the presence of counsel during the investigative interview. It is true that that case unequivocally holds that there is no constitutional right to counsel until an administrative case moves from the investigative to the adjudicative phase.[107] Ashford, however, does not address and thus leaves the door open for an argument that there may be a statutory right to counsel in certain circumstances.[108]

Fortuna's claim of entitlement to counsel is based on two statutes, the Atomic Energy Act and the Administrative

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[105] See supra pp. 14-17.

[106] Supra note 91, 6 MSPB at 391-92.

[107] Ibid. Accord Deatrick v. Dep't of Treasury, 9 MSPB 507, 509 (1982).

[108] See 6 MSPB at 391.

Procedure Act. His argument is confusing but appears to be as follows. In responding to his court action seeking injunctive relief, the agency cited section 161c of the AEA.[109] That provision authorizes the Commission to conduct

> investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this Act, or in the administration or enforcement of this Act, or any regulations or orders issued thereunder. For such purposes the Commission is authorized to administer oaths and affirmations, and by subpena to require any person to appear and testify or appear and produce documents, or both, at any designated place.[110]

Pursuant to AEA section 181, "[t]he provisions of the Administrative Procedure Act . . . shall apply to all agency action taken under this Act. . . ."[111] APA section 555(b), in turn, entitles "[a] person compelled to appear in person before an agency or representative thereof . . . to be accompanied, represented, and advised by counsel." That section also states that "[a] party is entitled to appear in person or by or with counsel . . . in an agency proceeding." It further directs the agency to proceed "[w]ith due regard

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[109] Defendants' Opposition to Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction at 4 n.1, 5 n.2, Fortuna v. NRC, No. 89-0513 (D.D.C.) [hereinafter, "Defendants' Court Opposition"].

[110] 42 U.S.C. § 2201c.

[1] Id. § 2231.

for the convenience and necessity of the parties or their representatives."[112] Section 555(c) provides that investigative acts be performed "as authorized by law," and section 555(d) addresses the procedures to be followed in connection with subpoenas.[113] Fortuna thus reasons that, if AEA section 161c is the authority by which the subject investigative interview was undertaken, then under the APA he was entitled to have counsel present and the agency was obliged to defer its investigation until a time convenient for his chosen counsel.

The agency responds that there is no legal precedent to support Fortuna's argument. It also cites considerable legislative history for the Civil Service Reform Act of 1978 to buttress its view that Congress has never intended to extend the APA right to counsel to a federal employee subject to an internal agency investigation. The agency argues further that APA section 555(b) applies only to persons subpoenaed to appear before the agency, not to employees required to appear by management directive in lieu of a subpoena.[114]

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[112] 5 U.S.C. § 555(b).

[113] Id. § 555(c), (d).

[114] Agency Brief at 35-41.

The agency appears to be correct that there is no case law to support Fortuna's statutory right-to-counsel arguments. But there is likewise no case law to support the agency's view. No doubt this is because "[b]oth courts and agencies often overlook the APA provision on right to counsel."[115] Whether an internal agency investigation of an agency employee's conduct in the performance of his or her official duties is "agency action" or an "agency proceeding" subject to the APA involves complex questions of statutory interpretation and construction.[116] Fortunately, there is

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[115] K. Davis, Administrative Law Treatise § 14.17, at 76 (2d ed. 1980) [hereinafter, "Davis (2d ed.)"].

[116] AEA section 181, on which Fortuna relies, provides that all "agency action" by the NRC pursuant to the AEA is governed by the APA, and that "agency action" has the same meaning that it does in the APA. 42 U.S.C. § 2231. The APA defines "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). An internal agency investigation of one of its own employees does not readily fit within any of those terms as they are commonly understood. Nor does it easily fit within the term "agency proceeding" (used in APA section 555(b) on which Fortuna also relies). "Agency proceeding" is defined as rulemaking, adjudication, or licensing. 5 U.S.C. § 551(12). See id. § 551(5), (7), (9).

One theory underlying the APA, however, is that everything an agency does is either rulemaking, adjudication, or licensing. Licensing is a form of adjudication, and the latter covers everything other than rulemaking. An investigation might well be construed as "other than rulemaking" and thus an "agency proceeding" at which one is entitled to representation by counsel. Davis (2d ed.), § 14.17, at 75. But see K. Davis, Administrative

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no need to resolve that issue here: as a matter of practice, OIA permits non-bargaining unit employees (like Fortuna) to have counsel present during non-criminal investigative interviews,[117] and that practice was duly

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Law Treatise § 3.01 n.1 (1958) [hereinafter, "Davis (1958)"] (arguing that an investigation, not being rulemaking, is necessarily adjudication "strains too much the accepted meaning of adjudication"); Int'l Tel. & Tel. Corp. v. Local 134, IBEW, 419 U.S. 428, 443 (1975) ("As the Attorney General's Manual on the Administrative Procedure Act 40 (1947) observed: '[I]nvestigatory proceedings, no matter how formal, which do not lead to the issuance of an order containing the element of final disposition as required by the definition, do not constitute adjudication'").

Other anomalies within the APA obfuscate the problem further. The first sentence of section 555(b), affording a person compelled to appear before an agency the right to counsel, clearly applies to situations involving subpoenas. Davis (1958), § 8.10, at 554-55. See also Special Counsel v. Dep't of Hous. and Urban Dev., 15 MSPR 204, 209 (1983). But here, Fortuna was ordered to appear for the OIA interview pursuant to the directive of his superior, not by subpoena. See Tr. (Feb. 15) at 22. Thus, the first sentence of section 555(b) is inapposite. The second sentence, which entitles a person to appear with counsel at "an agency proceeding," however, is not so easily dismissed. And, it circles back to the essential question of whether an internal investigation of an agency employee is an "agency proceeding" under the APA. To complicate matters further, APA section 555(c) refers to a "nonpublic investigatory proceeding." This suggests that the APA might extend to internal investigations of agency employees (which are supposed to be "nonpublic"), even though they do not look like the usual grist for the APA mill -- i.e., rulemakings and adjudications. As Davis aptly states, "[a]ltogether, the APA provision [section 555(b)] is susceptible of considerable improvement." Davis (2d ed.), § 14.17, at 75.

[117] Letter from Chairman L.W. Zech, Jr., to Honorable M.K. Udall (Feb. 24, 1989) [hereinafter, "Udall Letter"], Answer to Question 1; videotaped speech by Sharon Connelly
(Footnote Continued)

followed here. Fortuna had counsel present and actively participating at the February 15 interview.[118] Moreover, from the date Resner first notified him that he was to be reinterviewed (January 26) until the February 15 interview, Fortuna had ample time to obtain a lawyer.[119] Indeed, OIA postponed the interview twice during this period to accommodate Fortuna and his counsel.[120] No more could reasonably be expected on the part of the agency.[121] Fortuna's "right-to-counsel" arguments thus fail.

B. Testimony under oath. Fortuna, through his counsel, repeatedly asked the OIA investigators before and

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to NRC Region IV employees (May 9, 1988) [hereinafter, "Connelly Speech"] at 2708-45, 3362-97. (Note: numbers used to identify portions of the Connelly Speech are the approximate tape counter numbers on an NRC video recorder, and may vary from VCR to VCR.)

[118] See Tr. (Feb. 15), passim. See also Fortuna v. NRC (Mar. 21, 1989) (order denying preliminary injunction at 3) (dispute over "no right to counsel" was resolved).

[119] This is particularly so, given that Fortuna should have reasonably inferred soon after January 13 (when Resner removed the Ellison file from Fortuna's office) that the investigation was resuming and focusing on him.

[120] See supra pp. 4-5.

[121] To the extent that Fortuna complains that he and his counsel lacked adequate preparation time because Fortuna's file on the Ellison charges was not returned until the day before the interview, this appears to be Fortuna's own fault. The record here indicates that no request for the file was made until February 13 -- a full month after it was removed -- and that request was honored within 24 hours. See supra pp. 7, 8.

during the February 15 meeting for their authority to question Fortuna under oath, but in each instance the investigators declined to provide a responsive answer.[122] It was not until Fortuna subsequently sought the assistance of the court that the agency answered this simple question.[123] In its opposition to Fortuna's motion for a TRO and preliminary injunction, the agency pointed to the Commission's authority to administer oaths and affirmations, found in AEA section 161c, and supplied evidence -- in the form of a February 8, 1985, memorandum from a former NRC Chairman to former OIA Director Connelly -- that the Commission had, in fact, delegated this authority to OIA.[124]

The agency thus argues here that OIA was clearly authorized to question Fortuna under oath. Citing the

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[122] Feb. 13 Greenspun Letter at 2; Tr. (Feb. 15) at 11-13, 17, 25-26, 31-32.

[123] The agency claims that on February 17 and 21 it did provide information to Fortuna's counsel concerning the agency's authority to proceed with the investigation. Agency Brief at 14, 34. The information assertedly provided, however, was not responsive to Greenspun's questions concerning the requirements that Fortuna's testimony be under-oath and on-the-record. See ibid. Moreover, even if the information had been responsive, it was supplied too late to have permitted Fortuna to alter his conduct: Fortuna was charged with misconduct and reprimanded for failing to cooperate in the OIA investigation, culminating in his refusal to answer questions at the February 15 interview. Feb. 22 Proposal to Remove at 2, 3.

[124] Defendants' Court Opposition at 5 n.2.

practice and policy of a number of other federal agencies, it also contends that statutory authority for obtaining testimony under oath from an employee who is the subject of an internal investigation is not even required.[125] The agency further asserts that, because Fortuna was obliged by 18 U.S.C. § 1001 to answer questions truthfully, with or without taking an oath, the issue whether OIA could compel his testimony under oath is essentially irrelevant. Moreover, the agency argues, Fortuna (as a former Assistant United States Attorney) undoubtedly knew this, and thus he should have suggested an alternative means of conducting the interview without an oath.[126] The agency's arguments, however, are not persuasive.

Implicit, if not explicit, in the agency's position is the notion that Fortuna was somehow unreasonable or disingenuous in questioning OIA's authority to interview him under oath. Thompson's directive, however, was unequivocal in its mandate that the interview be "under oath."[127] Oaths and affirmations are not to be taken lightly; indeed, the reason they are often required is to impart an added element of seriousness and probity to the occasion. Further, the

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[125] Agency Brief at 45-53.

[126] Id. at 54-56.

[127] Feb. 9 Thompson Mem. at 2.

agency itself recognizes that there must be some authority -- be it found in a statute, regulation, or agency policy -- for administering an oath. Although it is now clear that OIA was, in fact, delegated the authority to administer oaths vested in the Commission by AEA section 161c, that surely was not the case at the time Fortuna was ordered to raise his right hand and swear. In fact, that delegation of authority is memorialized in only an obscure, nonpublic memorandum that is not even included in OIA's own Handbook.[128] No "legal research" of material in the public domain could have disclosed it.[129] Comparable delegations, particularly those derived from AEA section 161c authority, are incorporated in either the agency's regulations or the NRC Manual so as to be readily available.[130] In these circumstances, it was eminently reasonable for Fortuna to question the legitimacy of the order to testify under oath.

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[128] The February 1985 memorandum delegating authority to OIA to administer oaths shows that a copy was sent to OI, Fortuna's office. There is nothing in this record, however, to suggest that Fortuna himself had actual knowledge of the memorandum, nor does the agency so argue.

[129] See Agency Brief at 33.

[130] See, e.g., 10 C.F.R. § 2.718(a); NRC Manual Chapter 0119, ¶ 038. Compare NRC Manual Chapter 0113, ¶¶ 031-033. See generally id. Chapter 0101, App. Part IV, § A.1 ("Delegations of authority for performing major agency functions shall be incorporated as rapidly as possible into appropriate NRC Manual Chapters").

Nevertheless, as is now evident, the OIA investigators did possess delegated authority to question Fortuna under oath. That fact, however, does not end the inquiry, for Fortuna has repeatedly argued that OIA's actions did not conform to its own policies. As discussed above, investigators are obliged to follow their own proper procedures.[131] Hence, the question remains whether OIA exercised its delegated authority to interview Fortuna under oath in accordance with those procedures.

The agency does not reply directly to that question. In pressing the argument that no statutory authority for administering oaths is even necessary for agencies conducting internal investigations of their own employees' work-related performance, however, the agency points to the policies and practices of several other agencies. In each such instance, the federal agency's policy is found in some pertinent agency document, like a personnel manual, administrative order, or regulation.[132] It is therefore appropriate to look to any similar NRC, and particularly OIA, documents to ascertain exactly what this agency's policy is with regard to internal investigative interviews conducted under oath.

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[131] See supra p. 27.

[132] Agency Brief at 47-53.

As already noted, the NRC Manual Chapter on OIA contains no reference whatsoever to either OIA's authority to administer oaths or the circumstances in which such a procedure might be used.[133] The OIA Handbook states (without the supporting documentation or reference) that the OIA Director and specified others within OIA have been delegated authority by the Commission to administer oaths; the Handbook does not describe, however, when under-oath questioning is to be undertaken or, indeed, required, as it was in Fortuna's case.[134] Apparently, oaths are not always or routinely required, though, because the Handbook includes a sample statement that a witness is expected to sign if he or she has provided information "not taken under oath."[135]

Other materials in the record for this grievance shed additional light on what the agency's policy is on requiring oaths in internal investigative interviews. In a May 9, 1988, videotaped speech to NRC employees in Region IV, former OIA Director Connelly stated that OIA's procedures -- including putting witnesses under oath -- had become more formal and structured in recent times as a response to past

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[133] See NRC Manual Chapter 0113.

[134] OIA Handbook at III-12, III-26. See generally id. at III-15 to III-27.

[135] Id. at III-27 (emphasis in original).

criticism.[136] It is fair to infer from this statement that OIA had thus begun to place more and more witnesses under oath routinely, at least a year before Fortuna's interview. Consistent with the agency's argument here, Connelly also indicated that whether a witness is under oath or not is irrelevant, because, in either case, the witness is obliged by law to tell the truth.[137] Affidavits from Herr and Resner, however, are more revealing: "An employee who objects to being interviewed under oath is not required to take an oath since it is, in any event, a violation of 18 U.S.C. § 1001 for an employee to provide false statements to OIA in an official NRC investigation."[138] Further, in a letter to Congressman Morris K. Udall shortly after the February 15 (attempted) interview of Fortuna, former NRC Chairman Lando W. Zech, Jr., stated that "[a]ny employee who declines to take the oath is simply advised that all answers provided in the investigatory interview are to be truthful under penalty of 18 U.S.C. 1001 (crime of making a false statement in an official government matter)."[139]

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[136] Connelly Speech at 2285-2310, 2337-43.

[137] Id. at 2344-75.

[138] Herr Affidavit at 2 and Resner Affidavit at 2 (emphasis added).

[139] Udall Letter, Answer to Question 2 (emphasis added).

On the basis of this record, it can therefore be fairly stated that OIA's policy and practice at the time of Fortuna's interview was to place witnesses under oath, but upon objection, to drop the oath requirement and to advise the subject that he or she was obliged by law to answer the questions truthfully in any event. The record here also shows that OIA did not follow this policy with respect to the February 15 Fortuna interview. When Fortuna, through his counsel, balked at the notion of taking an oath,[140] OIA Deputy Director Herr replied only that such was authorized, consistent agency practice and that Fortuna was required to respond as directed; Herr adamantly refused to identify OIA's underlying legal authority for administering oaths and, more important, refused to back away from the oath "requirement" and failed to advise Fortuna that the oath was not necessary due to his lawful, independent obligation to respond truthfully with or without an oath.[141] Not only was

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[140] The agency suggests that Fortuna did not clearly object to taking an oath. Agency Brief at 55. Given the record here, this argument is disingenuous, at best, and warrants no extended discussion.

[141] Tr. (Feb. 15) at 13, 15, 17, 25, 27, 28-29. See also Mar. 29 Response at 5, 6 & n.1, 16 n.5.

The agency notes that Thompson's February 9 directive to Fortuna refers to 18 U.S.C. § 1001. Agency Brief at 56 n.35. That reference, however, is not in the context of an alternative to taking an oath. Fortuna was unquestionably

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this contrary to OIA's policy and practice, it was also inconsistent with the agency's professed need to get on with the interview and the investigation.

The agency argues that Fortuna should have known an oath was not required and should have suggested an alternative means of conducting the interview without an oath.[142] The agency, however, cites no authority for the proposition, implicit in this argument, that an agency may be excused from following its own investigative procedures and policies depending on who is the subject of the investigation. It is likewise novel to suggest that, if the subject of an investigation objects to an investigative tactic, it is up to him or her to offer an alternative investigative procedure. Fortuna, nonetheless, did just that by offering from the outset to respond to a note-taking

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ordered in one paragraph to participate in the interview "under oath" and "on the record." In another paragraph, Thompson states: "This is not a criminal matter and nothing you say in the course of this investigation may be used against you in any criminal proceeding, except for perjury or false statements made in violation of 18 U.S.C. § 1001." He goes on to say: "Failure to comply with this directive will result in disciplinary proceedings against you." Feb. 9 Thompson Mem. at 2. A fair reading of the Thompson memorandum, especially in conjunction with the transcript of the February 15 interview, makes it clear that Fortuna was ordered to testify under oath -- period -- without regard to any independent obligation under Title 18 of the U.S. Code.

[142] Agency Brief at 55-56.

interview.[143] Finally, the agency questions Fortuna's motives and suggests an intent on his part to avoid an accurate record of the interview and to prolong the investigation.[144] Assuming arguendo that was Fortuna's intent -- an issue I need not decide -- OIA had the ability all along to thwart it. In response to Fortuna's counsel's repeated requests, the OIA investigators need only have (1) quickly produced the 1985 memorandum reflecting the statutory and administrative delegation of authority to OIA to question witnesses under oath, and (2) followed OIA's own policy of advising a witness that he or she is not required to take an oath but must nonetheless respond truthfully under penalty of law. Had the investigators done so, they could have quickly short-circuited this assertedly obstructionist strategem of Fortuna. But by taking the hard-line approach they did, the OIA investigators were themselves active contributors to delay in the investigation, unfortunately raising doubts, well-founded or not, about their own motives.[145]

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[143] The agency dismisses this type of interview as "frequently . . . unreliable." Id. at 55 n.34. But see infra pp. 50, 52.

[144] Agency Brief at 56. See also id. at 35.

[145] It cannot reasonably be argued that, in steadfastly ordering Fortuna to answer questions under oath, OIA was
(Footnote Continued)

C. The transcribed (on-the-record) interview.

Fortuna's last objection concerns the directive that he answer questions "on-the-record," in an interview transcribed by a court reporter. Again, his counsel repeatedly asked the OIA investigators to identify their authority to require this procedure and questioned its conformity to OIA policy and practice. Herr's response was as succinct as that offered in connection with Fortuna's inquiry about OIA authority to require his statement to be under oath -- i.e., OIA had the authority, it was consistent OIA practice to conduct transcribed interviews, Fortuna was obliged to respond on-the-record, and a transcript was necessary to assure accuracy.[146] In its brief, the agency stresses the points that on-the-record interviews are the most accurate means of recording verbatim the substance of an interview and are consistent with the practice of not

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(Footnote Continued)
only carrying out Thompson's instructions. Thompson's affidavit suggests his primary concern was simply to get Fortuna to cooperate in the investigation; the procedures set out in his February 9 directive to Fortuna were merely based on advice he received, presumably from OIA and/or agency counsel, indicating that such procedures were standard practice. Thompson Affidavit at 2-4. The affidavit also implies that Thompson may not have been aware at the time of his February 9 directive that the oath could be "waived" in light of 18 U.S.C. § 1001. Id. at 6.

[146] Tr. (Feb. 15) at 13, 15-16, 28.

only OIA, but Fortuna's own office, OI.[147] In dismissing Fortuna's several offers to respond to the investigators' questions in another note-taking interview, the agency contends that such interviews are "frequently viewed as unreliable."[148]

It is obviously true, as the agency argues, that a more accurate rendition of an investigative interview will result from a verbatim transcript prepared by a neutral court reporter than from the notes of the investigator(s). So too, it is unreasonable to question -- as Fortuna's counsel did[149] -- why an accurate accounting of an interview is necessary and desirable. Moreover, Fortuna points to nothing to indicate that transcribing an investigative interview (with the witness's knowledge) is in any way illegal or unauthorized.[150] The issue here, however, is whether OIA's unyielding insistence on a transcribed interview, over Fortuna's objections, is consistent with that office's own practice and policy. If it is not, then that circumstance must be taken into account in determining

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[147] Agency Brief at 28-30. See also id. at 54 & n.33.

[148] Id. at 55 n.34.

[149] Tr. (Feb. 15) at 16.

[150] Indeed, as the agency points out, Fortuna's office, OI, occasionally uses a court reporter to transcribe certain of its interviews. But see infra pp. 52-53 & note 159.

whether Fortuna was guilty of misconduct in objecting to a transcribed interview.[151]

Citing the OIA Handbook, the agency states that "[r]ecording such interviews verbatim is consistent with OIA practice in particularly sensitive interviews."[152] That is not quite what the version of the OIA Handbook provided to me by agency counsel says, however. The Handbook makes no reference whatsoever to interviews transcribed by a court reporter, but does state that "[u]sually interviews conducted by OIA investigators will not be recorded by mechanical devices, such as tape recorders."[153] Thus, the Handbook devotes about two pages to how investigators should conduct note-taking interviews,[154] suggesting -- contrary to the agency's assertion on brief -- that this type of interview is certainly not considered "unreliable." The Handbook also states: "When conflicting information is anticipated from various witnesses or subjects and/or when it is deemed necessary to 'freeze' in time the witness'[s] or subject's statement, signed statements should be

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[151] See supra pp. 27-29, 31-32.

[152] Agency Brief at 29.

[153] OIA Handbook at III-23 (emphasis added).

[154] Id. at III-24 to III-26.

obtained."[155] Although the Handbook notes that "in unusual instances the exigencies of the investigation may warrant that the interview(s) be recorded," it does not specify or give examples of what those instances or exigencies might be.[156] In her speech to Region IV, Connelly stated that OIA had increased its use of court-reported interviews, but she questioned their effectiveness. Connelly identified, however, one type of interview where, by OIA policy and practice, it was necessary and desirable to have a court reporter present: when technical matters were involved, it was important to preserve the witnesses' statements precisely so that they could be analyzed later.[157] Connelly also stressed the need for investigators to be flexible, depending on the circumstances of any given interview; i.e., a less structured and less formal environment may well yield more useful information, resulting in a more productive investigation.[158]

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[155] Id. at III-26.

[156] Id. at III-23. See also Herr Affidavit at 5 ("it has been the practice of OIA since its inception to conduct on-the-record interviews in matters of particular significance or complexity"); id at 1-2; Resner Affidavit at 1.

[157] Connelly Speech at 2285-2319.

[158] Id. at 2320-37. See also id. at 3582-3675 (different investigators have different techniques, but the

(Footnote Continued)

The record thus shows that, pursuant to its established policy and preferred practice, (1) OIA ordinarily conducted note-taking interviews, like that to which Fortuna agreed; (2) if inconsistent statements were expected from different witnesses or there was otherwise a need to freeze a witness's testimony, signed, written statements were obtained; and (3) where technical matters were involved, a court reporter was used to transcribe the interview verbatim. Also, at least implicit in OIA's policy was the notion that, in the face of objections to certain investigative techniques, investigators should adapt their procedures to meet the needs of the particular circumstances so as to obtain the most useful information possible and to avoid unnecessary delay in the investigation.

There is no indication that technical matters of the sort to which Connelly referred were at issue in the investigation of Fortuna, nor does the agency so claim. Rather, calling attention to the policy of Fortuna's own office respecting the use of court-reported interviews,[159]

(Footnote Continued)
purpose is to get the truth; techniques vary, depending on whether investigation is criminal or administrative).

[159] OI uses a court reporter to transcribe interviews where the testimony is compelled by subpoena; the issues are highly technical; the witness and investigator are of different gender; there is a need for accuracy in a lengthy or complicated interview; the situation is confrontational;
(Footnote Continued)

the agency argues that a transcript was necessary because the interview was to be complex and possibly confrontational and related to charges of misconduct by a senior management official.[160] Those factors would clearly call for a transcribed interview under OI policy.[161] But OIA policy governs the inquiry here. The fact that the OI Investigative Procedures Manual specifies several particular circumstances in which that office uses a court reporter to transcribe investigative interviews only highlights the absence of a comparably well-defined OIA policy. As reflected in this record, OIA's practice and policy -- while not explicitly precluding the use of on-the-record interviews -- certainly disfavored this technique, and encouraged flexibility on the part of OIA investigators.[162]

(Footnote Continued)
and the witness is a senior level manager. SECY 88-265 (Sept. 19, 1988), Enclosure 1 (OI "Investigative Procedures Manual") at 5-3.

[160] Agency Brief at 29-30.

[161] See supra note 159. Fortuna misunderstands his own office's policy insofar as he believes that OI can record or transcribe only those interviews conducted pursuant to a subpoena. See Affidavit of Roger A. Fortuna, Jr. (Mar. 9, 1989) [hereinafter, "Mar. 9 Fortuna Affidavit"] at 3-4.

[162] The fact that, in another unrelated OIA investigation, Fortuna did not object to answering questions under oath and on-the-record (see Resner Affidavit at 2; Herr Affidavit at 2) does not constitute a waiver of his complaints here or show that OIA's usual practice was to require court-reported interviews. Significantly, Fortuna
(Footnote Continued)

In light of OIA's obligation to follow its own policies and practices,[163] it was therefore not unreasonable for Fortuna to resist being required to answer the OIA investigators' question in a court-reported interview. It is also unfair to penalize Fortuna for any shortcomings or vagueness in OIA's established policy. And, once again, in not following OIA's policy and past practice and by failing to proceed with a note-taking interview of Fortuna on February 15, the investigators themselves contributed to delay in the investigation, for which Fortuna should not be held accountable.[164]

III. Conclusion

The record shows that Fortuna did not categorically refuse to cooperate in OIA's investigation of the Ellison allegations; he objected only to certain procedures required

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(Footnote Continued)
voluntarily agreed to that other interview and was evidently considered a witness, rather than the target of that OIA investigation. Mar. 9 Fortuna Affidavit at 3.

[163] See supra p. 27.

[164] The investigators were not without options. For example, in the presence of the court reporter, the investigators could have noted for the record Fortuna's refusal to have the interview transcribed verbatim; advised Fortuna that he would accordingly bear the risk of any discrepancies in their note-taking; then dismissed the stenographer and proceeded with a detailed note-taking interview. Consistent with the OIA Handbook's direction, they also could have obtained a signed statement from Fortuna. See supra pp. 50-51.

by the investigators -- namely, that he testify under oath and in a court-reported interview. Fortuna agreed from the outset to respond to questioning in a note-taking interview and eventually did submit to an on-the-record interview in connection with this matter.

Federal employment case law recognizes that, in such instances involving an employee's conditional or temporary refusal to cooperate in an internal agency investigation, a decisionmaker may take account of the circumstances surrounding the employee's conduct, including the actions of the investigator, in order to determine whether a charge of misconduct against the employee should stand.[165] In this case, the OIA investigators failed to follow their own policy and established practice by steadfastly requiring Fortuna to respond to their questions under oath and in a court-reported interview. Although OIA had the authority to question persons in this manner -- and both procedures may be a good idea in many situations -- OIA's policy was to require neither, particularly in the face of objections.

The subject of an investigation should not be able to control or to dictate the manner in which the investigation is conducted. Further, investigators must be allowed reasonable flexibility so as to facilitate their search for

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[165] Brown, 20 MSPR at 526. See supra pp. 27-29, 31-32.

the truth. It is also not my prerogative in the context of deciding this grievance appeal to second-guess professional investigators on how they should do their work.

That being so, however, once investigators establish policies and follow certain practices over a period of time, they are obliged either to observe faithfully those policies and practices, or to change them generically -- not on an ad hoc basis.[166] Fundamental fairness and a concern for the reasonable expectations of employees who may be subject to investigation demand no less. The two respects in which the OIA investigators here departed from their own policy -- requiring Fortuna to testify under oath and on-the-record -- are not minor matters. Were they so, presumably these procedures would not have been required in the first place and there would have been no reprimand for Fortuna's failure to comply. Moreover, requiring a person (especially the subject of an investigation) to answer questions under oath before a court reporter necessarily and intentionally increases the formality, tension, and seriousness of the interview. It was thus reasonable for Fortuna to question the use of such procedures.

While there may be good cause in some situations for an ad hoc departure from established policy and practice, it is

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[166] See Connelly v. Nitze, 401 F.2d at 423.

not apparent what legitimate investigative purpose was served in this case by not "going by the book." Indeed, failure to follow set procedures here surely led to delay and frustration of the underlying investigation itself. Finally, it is only fitting to hold OIA -- the office that was responsible for investigating and auditing other NRC offices and programs -- strictly accountable for following the very policies and procedures it freely adopted.

In the totality of these circumstances, the charge of misconduct against Fortuna is not justified.[167] Accordingly, the grievance is upheld, the charge of misconduct is dismissed, and the 18-month letter of reprimand is to be expunged from Fortuna's Official Personnel Folder.

Christine N. Kohl

Christine N. Kohl
Chairman and Chief
Administrative Judge
Atomic Safety and Licensing
Appeal Panel

December 1, 1989

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[167] It bears emphasis that the outcome here might well have been different, except for two critical facts: (1) Fortuna's consistent willingness to submit to a note-taking interview, and (2) OIA's departure from its established policy and practice in, not one, but two respects.

APPENDIX

The following is a list of all documents and other materials supplied by the grievant and the agency, which constitute the Official Grievance File.

I. Materials provided by the Office of Personnel, Labor Relations Branch

Memo from Stello to Kohl, dated 6/29/89
re: Deleg. of authority

Ltr from Stello to Greenspun, dated 6/29/89
re: Desig. of C. Kohl

Ltr from Greenspun to Stello, dated 6/27/89
re: formal grievance of ltr of reprimand

Attachments:

Ltr from Sharp to Zech, dated 5/23/89

H.R. Subcommittee on Energy and Power, Report on Fortuna Case, dated 5/23/89

Ltr from Sharp to Bowsher, dated 5/23/89

Ltr from Taylor to Fortuna, dated 6/22/89, re: Reprimand

Ltr of Reprimand, dated 6/22/89

Ltr from Greenspun to Taylor, dated 5/30/89
re: supplement to answer proposed removal

Attachments:

Ltr from Sharp to Zech, dated 5/23/89

H.R. Subcommittee on Energy and Power, Report on Fortuna Case, dated 5/23/89

Ltr from Sharp to Bowsher, dated 5/23/89

Ltr from Greenspun to Taylor, dated 5/18/89
re: supplement to response of proposed removal

Attachment:

Draft Memo from Hayes to File, dated 2/21/89

Ltr from Greenspun to Taylor, dated 4/5/89
re: response to D. Dambly's hypothetical

Transcript, dated 3/29/89
re: oral response to proposed notice of removal

Ltr from Greenspun to Taylor, dated 3/29/89
re: written response to proposed removal

(No Attachments)

Ltr from E. Hadley to Greenspun, dated 3/28/89
re: 1/14/87 conv. between S. Comley and R. Fortuna

Decision, dated 3/21/89 denying plaintiff's motion for a preliminary injunction

Ltr from Greenspun to Taylor, dated 3/14/89
re: ad testificandum interview

Attachment:

Ltr from Greenspun to Rosenthal, dated 3/14/89 re: interview of R. Fortuna

Ltr from Taylor to Greenspun, dated 3/8/89
re: notice of additional time to respond to 2/22/89 ltr

Ltr from Greenspun to Herr, dated 2/23/89
re: confirmation of interview on 3/6/89

Ltr from Greenspun to Thompson, dated 2/22/89
re: 2/22/89 proposed removal of R. Fortuna

Ltr from Thompson to Fortuna, dated 2/22/89
re: proposed removal because of conduct

Attachments:

Memo from Thompson to Fortuna, dated 2/9/89, re: Directive to Attend OIA Interview

Ltr from Greenspun to Thompson, dated 2/13/89

Memo from Thompson to Fortuna, dated 2/14/89, re: Confirmation of 2/9/89 Directive

Transcript, dated 2/15/89 re: Investigative Interview of R. Fortuna

Ltr from Greenspun to Thompson, dated 2/13/89

Ltr from Greenspun to Thompson, dated 2/14/89

Memo from Thompson to Fortuna, dated 2/14/89 re: Confirmation of 2/9/89 Directive

Pleadings filed in Fortuna v. NRC, No. 89-0513 (D.D.C.):

Complaint for Declaratory and Injunctive Relief; Request for a Hearing, dated 2/27/89 (and required certificates)

Plaintiff's Motion for a TRO and Preliminary Injunction, dated 2/27/89

Plaintiff's Memorandum of Fact and Law in Support of TRO, undated

Plaintiff's Exhibits in Support of Motion for TRO:

Affidavit of Roger Fortuna, dated 2/24/89

February 2, 1989 Memo from M. Resner to R. Fortuna

February 7, 1989 Memo from M. Resner to R. Fortuna

February 13, 1989 Letter from J. Greenspun to H. Thompson

February 9, 1989 Memo from H. Thompson

February 14, 1989 Memo from H. Thompson to R. Fortuna

January 13, 1989 handwritten Memo of Delores Lewis, OI secretary

Affidavit of Julian S. Greenspun, dated 2/24/89

OIA Advice of Rights Warning

Court Reported Transcription of Proceedings at OIA on February 15, 1989

9/30/86 Letter from Congressmen Udall & Gejdenson to NRC Chairman and attached Letter from DOJ to General Counsel, NRC

February 21, 1989 Letter from J. Greenspun to Dennis Dambly, Esq.

February 22, 1989 proposed Notice of Removal from Federal Service, from H. Thompson to R. Fortuna

Public Law 100-504 and legislative commentary excerpts (1988 Amendments to I.G. Act)

NRC Manual chapter on OIA policy re: Notification and Investigation of Misconduct; Function and Organization of OIA

April 9, 1987 Statement of Senator John Glenn

April 9, 1987 Statement of Ben Hayes Director of NRC's Office of Investigations, before Senator Glenn's Committee on Governmental Affairs

Defendants' Opposition to Plaintiff's Motion for a TRO and Preliminary Injunction, dated 3/8/89

Attachments:

Affidavit of Mark E. Resner, dated 3/6/89

Affidavit of Frederick Herr, dated 2/6/89 [sic: 3/6/89]

Affidavit of Hugh L. Thompson, Jr., dated 3/7/89

Plaintiff's Reply Memorandum in Support of Plaintiff's Motion for a TRO and Preliminary Injunction, dated 3/9/89

Exhibits in Support of Plaintiff's Reply Memorandum:

February 24, 1989 letter from NRC Commissioner Zech to Congressman Udall

Excerpts of NRC statutes and the Administrative Procedures Act

Videotape recording of 5/9/88 speech by Sharon Connelly and digest of tape

9/1/88 consulting contract between Douglas Ellison and the NRC

Excerpts from Office of Investigations Manual

R. Fortuna affidavit, dated 3/9/89

Ben Hayes affidavit, dated 3/8/89

R. Fortuna telephone message slips

Affidavit of Julian S. Greenspun, dated 3/9/89

7/16/82 Delegation of Authority to OI (Office of Investigations)

Excerpts from OIA Manual

II. Materials generated at third level of grievance review

Ltr from Greenspun to Kohl, dated 7/10/89

Ltr from Kohl to Greenspun, dated 7/21/89

Ltr from Kohl to Greenspun and Dambly, dated 7/31/89

Attachment:

Table of Contents for Official Grievance File compiled by the Office of Personnel

Ltr from Greenspun to Kohl, dated 8/1/89

Memo from Dambly to Kohl, dated 8/4/89

Ltr from Kohl to Greenspun and Dambly, dated 8/7/89

Ltr from Greenspun to Kohl, dated 8/16/89

Attachment:

Senate Comm. on Governmental Affairs, 101st Cong., 1st Sess., Serious Problems Continue in the Nuclear Regulatory Commission's Internal Investigations (Comm. Print 1989)

Ltr from Dambly to Kohl, dated 8/17/89

Ltr from Kohl to Dambly, dated 8/17/89

Ltr from Greenspun to Kohl, dated 8/18/89

Ltr from Kohl to Greenspun, dated 8/21/89

Ltr from Kohl to Dambly, dated 9/5/89

Ltr from Greenspun to Kohl, dated 9/6/89

Memo from Itzkowitz to Kohl, dated 9/7/89

Attachment:

OIA Handbook

Brief for the Agency, dated 9/22/89

Attachments:

Report of the Committee on Governmental Affairs, United States Senate: Serious Problems Continue in the Nuclear Regulatory Commission's Internal Investigations, August 1989

Motion to Quash filed by Stephen B. Comley with the NRC In the Matter of: Roger A. Fortuna, Subpoena to Stephen B. Comley

Affidavit of Hugh L. Thompson, Jr. (March 7, 1989) filed in Fortuna v. NRC et al., Civ. Action No. 89-0153

Transcript of January 14, 1987 telephone conversation between Roger A. Fortuna, Jr., and Stephen B. Comley

SECY-88-265 (September 19, 1988) with selected portions of Enclosure 1, Investigative Procedures Manual, Office of Investigations

Affidavit of Mark E. Resner submitted in Fortuna v. NRC et al., Civ. Action No. 89-0153

Affidavit of Frederick Herr submitted in Fortuna v. NRC et al., Civ. Action No. 89-0153

Memorandum dated February 8, 1985 from N.J. Palladino to S. Connelly

Department of Commerce Administrative Order 207-10 (1981)

Sworn statements by R.A. Fortuna in Shea and Logan Matters (RF 9 and RF 12)

Letter dated March 28, 1989, from E.C. Hadley to J. Greenspun

Pages 41-45 of Transcript of January 16, 1987 telephone conversation between R.A. Fortuna and Stephen B. Comley

Select pages of OIA September 12, 1988 interview of Douglas Ellison

Respondent's July 6, 1989 Motion to Stay Order of U.S. District Court, M.B.D. No. 89-422

Ltr from Greenspun to Kohl, dated 9/27/89

Ltr from Kohl to Greenspun, dated 10/2/89

Ltr from Greenspun to Kohl, dated 10/4/89

Attachments:

Ltr from Dambly to Kohl, dated 8/17/89

Ltr from Greenspun to Kohl, dated 9/27/89

Ltr from Greenspun to Kohl, dated 10/13/89

Attachments:

Declaration of James A.F. Kelly, dated 5/20/89

Declaration of Ronald Smith, dated 5/20/89

Statement of Maureen Gawler to the Committee on Interior and Insular Affairs on 10/14/89

Testimony of Ben B. Hayes to H.R. Committee on Interior and Insular Affairs, dated 10/12/89

Opening Statement of Sen. John Breaux, Comanche Peak Investigation, undated

Attachments:

Portions of a Dept. of Labor Settlement Agreement between Joseph Macktal and Brown and Root, Inc.

Section 210, Energy Reorganization Act of 1974

18 U.S.C. § 201

Testimony of Joseph J. Macktal before the Subcommittee on Nuclear Regulation, dated 5/14/89