

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Law Judge
Morton B. Margulies

In the Matter Of)
LLOYD P. ZERR)
_____)

) Docket No. 93-01-PF
)
) ASLBP No. 93-673-01-PF
)
)

NRC RESPONSE TO DEFENDANT'S MOTION FOR RECONSIDERATION

Pursuant to this Court's April 5, 1994 request, the NRC submits its response to Defendant's motion for reconsideration. Defendant's pleading is rife with baseless arguments that either patently misstate or ignore the record. This tribunal's decision is firmly anchored in the law and the evidentiary record and accordingly, reconsideration of the Initial Decision ("I.D.") is not warranted.¹

1. Defendant's double jeopardy argument remains unfounded. In light of this Court's determination of damages in this case, the Defendant can show neither a previous jeopardy based on the proceedings in Georgia or a later jeopardy based upon the damage determination in this case. As previously determined by this

¹ Because the NRC's previous pleadings are similarly anchored in fact and law and the NRC has fully briefed most of the issues raised in this motion, we will reference the applicable sections of earlier filings to address many of the issues raised in Defendant's Motion.

Court, the bringing of an indictment which is ultimately dismissed after the Defendant meets the conditions of a pretrial diversion agreement does not place the Defendant in jeopardy. 38 NRC 151, 152 (1993); see also NRC REPLY TO DEFENDANT'S CLOSING BRIEF at 1-3 (February 7, 1994); NRC OPPOSITION TO DEFENDANT'S MOTION TO DISMISS at 4-5 (Sept. 2, 1993).

Even if jeopardy had attached due to the proceeding in Georgia, there exists no second jeopardy as a result of this proceeding. Defendant places a meaning to the "penalty" awarded in this case which is inconsistent with established law. In cases where jeopardy has attached, the government may obtain civil compensation according to a somewhat imprecise formula, such as liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment [or penalty] for purposes of double jeopardy analysis if the civil compensation bears a rational relation to the goal of compensating the government for its loss, including the costs of investigations. United States v. Halper, 490 U.S. 435 (1989); see also 38 NRC at 152. In this case, because the damages awarded the NRC are less than its loss (including the costs of investigation), Defendant cannot successfully assert that this compensation bears no rational relationship to the government's loss.

2. This Court did not ignore the testimony of Kenneth Brockman in determining that Mr. Zerr submitted false overtime

claims to the NRC. As this Court understands, the NRC has never contended that Mr. Brockman did not authorize Mr. Zerr to work overtime. I.D. at 17. What the NRC has contended throughout this trial, and what this Court concluded, is that Mr. Zerr abused this authorization by submitting claims for overtime that he did not work. Id 24-25.

Defendant, without any citation to the record, asserts that, "Mr. Brockman additionally indicated that the work to be performed could not be done in its entirety inside the protected area." This summary of Mr. Brockman's testimony is false and inaccurate. Mr. Brockman testified ". . . probably all of it could have been done in the resident's office," Tr. 734 (Brockman), and this Court correctly concluded that "[t]here was no probative evidence in the record to show that this project was worked on by the Defendant outside of the 7:00 a.m. to 4:00 p.m. work schedule that was followed by licensee staff." I.D. at 17. Defendant has put forward no credible argument to overcome this finding. See NRC REPLY TO DEFENDANT'S CLOSING BRIEF at ¶ 12.

3 & 4. The NRC understands Defendant to be asserting that this Court ignored the fact he did some work outside the protected area in concluding that the Defendant claimed false overtime. This Court did not ignore that fact and noted that the "Defendant did exit the protected area on many days between his first recorded entry and last recorded exit." I.D. at 17. This recognizes work done outside the protected area. At this point

in the proceeding, it should be clear to Defendant that the NRC has not charged him for false overtime claims during these time periods. Consistent with the basis of the complaint, the Court correctly found that the Defendant presented no evidence of any work performed before his first entry or after his last exit from the protected area to rebut the NRC's meticulously detailed showing that the Defendant did no such work. I.D. at 17-20.

5. Defendant's assertion that the "government failed to prove anything concerning the week-end" ignores the record. For instance, the NRC introduced computer records of Defendant's entry and exit from the protected area of the plant, including records of week-end days in which Mr. Zerr did not enter the protected area at all, but nonetheless claimed hours of work. NRC POST TRIAL BRIEF 11-13. Moreover, the Defendant testified that he could not recall any instances when he did not enter the protected area when he went to the plant. Tr. 468 (Zerr). The NRC, therefore, presented bountiful evidence that the Defendant did not work the week-end hours he claimed.

6. In the same baseless and irresponsible fashion as Defendant's "Closing Brief" Mr. Zerr alleges that two resident inspector witnesses testified as they did out of self-interest. This attack on individual motives and character lacks any foundation. While Mr. Zerr now states that "both of them wished to appeal [sic] better in the eyes of their supervisors," there

is no evidence of this in the record. The Defendant has offered no proof whatsoever of biased or hostile testimony by the NRC resident inspectors who testified. While not deserving of further recognition, the NRC notes that the person Mr. Zerr claims to be "clearly inferior to Mr. Zerr" passed his qualification board and became a resident inspector while Mr. Zerr failed his board even though Mr. Zerr had essentially twelve months to prepare for it.

7 & 8. This Court correctly concluded that the NRC presented convincing evidence that Lloyd Zerr submitted false claims for overtime and the Defendant failed to present evidence to rebut this showing. As the NRC has argued throughout this case, the computer time records of Mr. Zerr's first entry and last exit prove that the Defendant did not work the hours he claimed. See NRC POST TRIAL BRIEF at 6-21; NRC REPLY TO DEFENDANT'S CLOSING BRIEF at ¶¶ 13 & 14. After the NRC learned of Mr. Zerr's abuses he was told that he could no longer work any overtime without specific prior approval from management. Tr. 63 (Herdt Deposition). This was done because Mr. Zerr's own actions proved that he could not be trusted with any independence.

9, 10 & 11. Contrary to Defendant's allegation, this Court did not, on page 30, make mention of "the fact that claims were concealed." The Court was explaining that indeed claims were made, but their true purpose was hidden from view.

Defendant had disguised the true nature of his outlays. The Court correctly divined the essence of his scheme as ". . . rather than exposing a practice for which no reimbursement could be made, if known, he concealed it with a contrived false claim for rental furniture." I.D. at 30; See also NRC POST TRIAL BRIEF at 32-36; NRC REPLY TO DEFENDANT'S CLOSING BRIEF at ¶¶ 10 & 11. Contrary to Defendant's assertion, the fact that he attempted to have the government reimburse him for a "haul rental "to return furniture" so that he could move personal belongings back to Washington only buttresses this conclusion. See NRC Ex. 30 at 176; NRC Ex. 56 at 396.

12, 13 & 14. Defendant wholly ignores the record by stating that "the record is absolutely silent on any notice to Mr. Zerr of the change in rate." See NRC POST TRIAL BRIEF at 37-39; NRC REPLY TO DEFENDANT'S CLOSING BRIEF at ¶ 7. The Court correctly found that Defendant had reason to know that the car rental claims were false, basing this finding on, at the very least, Defendant's studied, deliberate attempt of not learning the cost of the monthly car rental by reviewing various Hertz contracts and his credit card bills. I.D. at 35. In addition, the Court is also correct in finding that Defendant, after signing three documents containing a lower rental price, submitted an expired rental agreement containing a higher price in order to receive more money from the government. Id. at 32-33.

15 & 16. The Defendant claimed reimbursement from the government for \$875.00 per month in "rent" for the house in Vidalia while separately claiming other expenses associated with the house such as lawn care and extermination. The NRC proved that the true rental amount for this property was \$600.00 per month. For Mr. Zerr to claim that "rent" included other expenses as a justification for submitting an expired lease and then an altered lease showing a higher rental amount is disingenuous on its face given the fact that he was individually claiming many of these expenses. See NRC POST TRIAL BRIEF at 39-41; NRC REPLY TO DEFENDANT'S CLOSING BRIEF at ¶ 12. The Court correctly found that Mr. Zerr could not justify additional expenses and instead "relied on false documentation to obtain it." I.D. at 39.

17. Contrary to Defendant's claim that he was "attempting to be thorough and accurate," this Court correctly concluded that the "accounting requirement to separate regional and Headquarters travel expenses is not a license to bill both." I.D. at 43. As the NRC detailed in its Post-trial Brief, Defendant's own admissions prove that he submitted false claims for use of a personal vehicle. Defendant admitted that he did not use a personal vehicle during these time periods; instead, he was using a car rented from Hertz which NRC Headquarters was fully reimbursing. NRC POST TRIAL BRIEF at 42-43. Moreover, the Defendant did not give "full and complete" information when submitting these claims to Region II because he did not disclose

that his claims for use of a personal vehicle concerned a rented vehicle which was being paid for by NRC Headquarters. Clearly, he relied on Region II not having complete information to further his fraudulent scheme.

18. See ¶ 1, supra.

19. Count XIV concerns false claims for furniture rental, car rental, lodging, and M&IE. The adverse finding is consistent with this Court's general finding on these subject areas and has already been addressed. That this Court imposed a penalty even though the false claim was not paid is entirely consistent with the Act and NRC regulations. 31 U.S.C. § 3802(a)(1)(D); 10 C.F.R. § 13.3(a)(1)(iv).

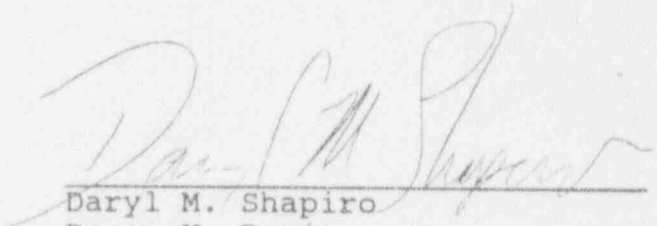
20 & 21. As stated in the NRC regulations, "[b]ecause of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed." 10 C.F.R. § 13.31(a). This Court correctly concluded that Lloyd Zerr "seized all opportunities to inflate his overtime and travel expenses throughout his 13-month rotational assignment and employed various deceptive means to accomplish his purpose." I.D. at 52. Given the egregiousness of Defendant's acts and the factors to be considered in determining

penalties and assessments, see NRC POST TRIAL BRIEF at 65-74, the double assessment and \$4,000 penalty is fully warranted.

22. In essence, Lloyd Zerr continues to deny responsibility for his own actions and to blame others. Any hardship Mr. Zerr has encountered is due only to his own acts. He has not been lied to nor mistreated. If anything, he has been fortunate and treated fairly by the Justice Department and the NRC. The result of his criminal act and subsequent indictment was a pretrial diversion agreement which required only restitution and did not leave Mr. Zerr with the stigma of a criminal record. The result of this proceeding leaves Mr. Zerr with a small judgement to pay in comparison to the potential liability he faced.

23. Defendant's motion for reconsideration should be denied as it states no argument which would warrant such a result. A hearing on this matter is not necessary.

Respectfully submitted,



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DATED: April 20, 1994

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC RESPONSE TO DEFENDANT'S MOTION FOR RECONSIDERATION" was served upon the following persons this 20th day of April, 1994, in the manner indicated:

BY HAND DELIVERY TO OFFICE

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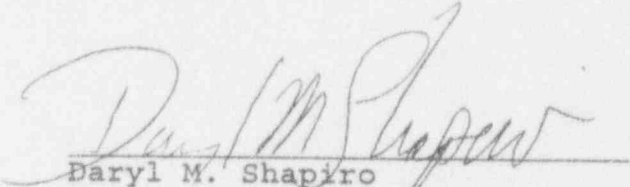
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