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

CHAIRMAN

November 23, 1982

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Dear Sirs:

In your letter of August 13, 1982 concerning the Nuclear Regulatory Commission's policies and practices for the conduct of investigations, you specifically requested that the Commission solicit public comments on proposed investigative policies prior to their adoption.

Most of the Commission's investigative policies and implementing procedures are directed to the specific methods or techniques utilized in the conduct of an investigation, e.g., report format, administration of oaths, retention of evidence, etc., and are inappropriate for public comment or dissemination. Therefore, the Commission does not intend to submit investigative policies for formal public comments. However, with respect to the issues you raised concerning individual rights, the Commission has decided to obtain comments from a small group of individuals outside the agency.

Sincerely,

Nunzio Palladino

Nunzio J. Palladino

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WRITER'S DIRECT DIAL NUMBER

August 13, 1982

Honorable Nunzio J. Palladino
Chairman
Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Chairman Palladino:

In April, the Commission announced, as part of an effort to improve the quality of its investigative work, a plan to establish a new Office of Investigations and requested the Acting Director of that office to submit proposed policies to govern future investigations. Because we believe that there are several areas in which the present practices could be improved, and several significant issues which could benefit from public scrutiny and discussion, we are writing to request that the Commission solicit public comments on the proposed policies prior to their adoption.

The manner in which investigations are presently conducted provides the context for consideration of these suggestions. Investigations often have their source in allegations received by the NRC of an activity or condition affecting safety. In our experience, investigators arrive with little or no advance notice and advise site management of the subject matter of the investigation only in the broadest terms. The source and content of the allegations are not disclosed. While occasionally the investigators present management with a list of the names of employees whom they wish to interview, the more common practice is to provide only one or two names for the first interviews, and then to inform management of the successive interviewees

as each interview is completed. The purpose of this technique appears to be to eliminate the opportunity for any significant consultation between management and the employees to be interviewed. Where it is complied with by management, it also eliminates or severely restricts any opportunity for management and the interviewees to obtain legal advice prior to the beginning of the investigation.

As the employees are interviewed, they are not informed by the NRC investigators that they have the right to be accompanied at the interview by an attorney or a non-lawyer representative. They also are not informed of the allegations except in general terms. The interview takes place in a private room with the employee alone with two or more NRC investigators. (Although the presence of two investigators is normal, we are aware of an instance where four NRC employees "interviewed" one witness at the same time.) If the allegations involve possible criminal charges, there is apparently no obligation under present guidelines for the investigators to advise the witness of this fact, even if the witness is a potential defendant. The employee is not advised that he need not answer questions which may tend to incriminate him, and the provisions of the various statutes possibly violated are not explained to him. He may be asked, at the conclusion of the interview, to give a written statement, sometimes under oath, but he will not be advised that he need not give such a statement, nor that he may take the statement in draft form to be reviewed by an attorney or other person of his choice. These practices apparently are followed regardless of the educational background of the interviewee.

It is apparent that these practices are designed to afford little or no opportunity for consultation with, or participation by, counsel. The result has been that most employees have submitted to interviews, and company management has cooperated in these investigations without either being informed of their rights.

The long-standing attitude in the nuclear industry has been one of voluntary compliance with NRC inspections and requests for information. However, recent statutory changes adding new criminal penalties to the Atomic Energy Act of 1954 (see, e.g., the 1980 amendments adding §§ 223(b) and 235) and higher civil penalty exposure (§ 234), as well as a revised Commission enforcement policy (10 C.F.R. Part 2, Appendix C) have caused various participants in the regulatory process to question

whether the procedures utilized by NRC investigators are fair to the company and to the employees being investigated. There is also a question as to whether present practices are as conducive as possible to the attainment of accurate, complete and impartial assessments of the relevant facts and whether they are structured to give appropriate deference to the rights of the individuals under the law.

It appears that the present practices which attempt to exclude or minimize the role of attorneys stem from a mistaken belief that the presence of counsel will somehow impede the investigation. Of course, the history of the protection of individual rights in this country clearly reflects the strong belief that investigative ease is not the only value to be served. However, even if that consideration was predominant, the fact is that an employee who has been adequately informed of his rights by a lawyer, who knows that legal counsel is available to protect his interests if necessary, and who knows whether he is personally at risk by consenting to an interview, will often be a more cooperative, relaxed interviewee. An interviewee troubled by the uncertainties of his position and his lack of knowledge of the scope and goal of the investigation is understandably guarded and defensive in his answers, and hesitant to volunteer information. Thus it is no surprise that several agencies expressly recognize in their rules the right of witnesses to have counsel present to advise them during investigative interviews. See 14 C.F.R. § 305.9 (CAB); 16 C.F.R. § 1118.7 (Consumer Product Safety Commission); 12 C.F.R. § 308.51 (FDIC); and 49 C.F.R. § 831.6 (NTSB).

In some instances, an employee who is informed of his rights may elect not to speak to the NRC investigators. However, the procedure for obtaining his testimony through use of a subpoena is a relatively simple matter. Under the Administrative Procedure Act, 5 U.S.C. § 1005(a), he would be entitled to the assistance of counsel when responding to questions under compulsion of a subpoena. It seems a dubious policy, and one apt to lead to an unnecessary insistence on formal interviews by means of subpoena, to allow the presence of counsel when a witness' appearance is compelled but deny it to him if he agrees to cooperate and appear voluntarily.

We believe that the policies to be adopted for the new Office of Investigations should recognize the legitimate interest of those involved in investigations to be informed of their rights by lawyers in an appropriate fashion.

Any employee is free to speak with the NRC in private if he chooses. The ready availability of resident inspectors at nuclear sites is well known to all employees, and it seems highly improbable that an individual who wished to communicate information to the NRC in a confidential or anonymous fashion would not be aware of the steps to take to accomplish that goal.

Another important issue in the conduct of investigations is the extent to which attorneys who represent the company may also represent the company's employees, assuming no conflict of interest is involved. (Of course, under the Code of Professional Responsibility a lawyer is required to decline employment involving conflicting interests in accordance with Disciplinary Rule 5-105.) We are aware of instances where some NRC investigators have taken the position that there is an "inherent conflict" between the interests of an employee and the company, without regard to any particular factual context of the investigation, and that the presence of a lawyer employed by the company is tantamount to the presence of a management official. Under this view, the lawyer's presence during the interview, even if requested by the employee, would "chill" the candid exchange of information between the employee and the investigator. The issue is of substantial significance because, as a practical matter, the only attorneys who are likely to be realistically available to employees are the counsel provided by the company, since most interviewees would be unable or unwilling to expend personal funds to hire an attorney. While the company could conceivably obtain a different law firm or attorney to represent each employee in an investigation, the company may be unwilling to do so because of the substantial costs involved, the possible delay in the investigation while counsel are obtained, and even the difficulty of finding lawyers reasonably available who are knowledgeable about NRC matters. (It has even been suggested that separate law firms, if they were retained and paid by the company, would not satisfy some investigators' desires to avoid any "management presence" during the interview. That extreme view at bottom rests only on a desire to avoid having counsel present.)

In several instances arising in other administrative contexts, the courts have addressed the issue of whether an agency may interfere with the choice of counsel by the person being interviewed because of its potential impact on the investigation. In Securities and Exchange Commission v. Csapo, 533 F.2d

7 (D.C. Cir. 1976), the SEC had invoked a seldom-used sequestration rule in an attempt to prevent a witness from being represented by counsel who had earlier represented other witnesses in the proceeding, including three principal targets of the investigation. The SEC argued that

> multiple representation increases the likelihood that subsequent evidence will be tailored, either consciously or unconsciously, better to conform with or explain what has come earlier.
>
> 533 F.2d at 9.

The Court noted that the APA's guarantee of the assistance of counsel was "phrased by the legislature in unequivocal terms," and had been construed to "imply the concomitant right to the lawyer of one's choice." Id. at 10-11. Rejecting the SEC's unfounded "speculation" that the objective of the investigation might be frustrated by the appearance of the same lawyers for more than one witness, the Court recognized that in many instances it was "likely that . . . representation [by the same attorney of more than one witness] may facilitate and expedite the proceedings," and overturned the Commission's order unless the SEC could adduce "concrete evidence" that the presence of the same counsel would obstruct and impede the investigation. 533 F.2d at 11.

A similar ruling was issued in Securities and Exchange Commission v Higashi, 359 F.2d 550 (9th Cir. 1966). The case involved an attorney who was representing both the corporation which was the subject of the SEC investigation and an individual who was a director of the corporation. The 9th Circuit, again rejecting the SEC's attempt to exclude this attorney, recognized that if corporate counsel were disqualified from representing the individual, he may well be deprived of effective representation:

> Where, as here, the interests of the witness and corporation are common, familiarity with a complicated corporate background would appear to be a prerequisite for effective representation. Independent counsel could only acquire such familiarity through the substantial expenditure of his time. The resulting

> cost may render corporate counsel the only adequately qualified counsel many directors can afford. On the other hand, where the director or corporation is willing and able to bear such additional costs, there is good reason to suppose that the parties would be able to accomplish through independent counsel exactly what the SEC's rule seeks to prevent. A rule which, except for a wealthy few, denies effective counsel is not permitted by the Administrative Procedure Act § 6(a), 60 Stat. 241, 5 U.S.C. § 1005(a) (1964).
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> 359 F.2d at 553 n.5

See also In re Coordinated Pretrial Proceedings, 658 F.2d 1355 (9th Cir. 1981); Backer v. Commissioner of Internal Revenue, 275 F.2d 141 (5th Cir. 1960).

It should be beyond debate that corporate management may advise, and may feel a duty to advise, its employees of their rights under the law during an investigation. We believe it stretches the term beyond all reasonable meaning to describe such advice as "chilling" the employees' willingness to cooperate with the investigation. The fact that the advice is given by attorneys employed by the company, rather than by non-lawyer company officials, seems to us to further diminish any possible chilling impact, since attorneys are both familiar with the legal principles applicable to investigations and are subject to professional discipline for actions in violation of accepted ethical codes.

There are many other issues of significance which warrant careful discussion and consideration, including (a) the authority of NRC representatives to release information to the press concerning an on-going investigation, and (b) the extent to which a company should be given an opportunity to rebut investigative findings before the conclusion of the investigation.

It is difficult to overemphasize the interest of the Commission, the public and the industry in assuring that investigations are, and appear to be, fair and accurate methods

of establishing facts to be used in the discharge of the Commission's important responsibilities. Giving the Commission the opportunity to consider the views of the public and the industry in shaping its investigatory policies would help achieve that goal.

Sincerely,

Gerald Charnoff

J. Patrick Hickey

cc: Commissioner Victor Gilinsky
Commissioner James K. Asselstine
Commissioner John F. Ahearne
Commissioner Thomas M. Roberts