

NUREG-0750
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NUCLEAR REGULATORY COMMISSION ISSUANCES

September 1995



U.S. NUCLEAR REGULATORY COMMISSION

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NUREG-0750
Vol. 42, No. 3
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NUCLEAR REGULATORY COMMISSION ISSUANCES

September 1995

This report includes the issuances received during the specified period from the Commission (CLI), the Atomic Safety and Licensing Boards (LBP), the Administrative Law Judges (ALJ), the Directors' Decisions (DD), and the Decisions on Petitions for Rulemaking (DPRM).

The summaries and headnotes preceding the opinions reported herein are not to be deemed a part of those opinions or have any independent legal significance.

U.S. NUCLEAR REGULATORY COMMISSION

Prepared by the
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Office of Administration
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
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Shirley A. Jackson, Chairman
Kenneth C. Rogers

B. Paul Cotter, Jr., Chief Administrative Judge, Atomic Safety and Licensing Board Panel

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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Frederick J. Shon, * *Deputy Chief Administrative Judge (Technical)*

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LICENSING BOARDS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chairman
Dr. Jerry R. Kline
Frederick J. Shon

In the Matter of

Docket No. IA 94-001
(ASLBP No. 94-694-05-EA)
(Re: Allegation of
Deliberate Violations)

HARTSELL D. PHILLIPS, JR.
(West Virginia)

September 19, 1995

The Board dismissed this case by adopting a settlement agreement reached by Mr. Phillips and the Staff of the Nuclear Regulatory Commission. The Settlement occurred after Mr. Phillips pled guilty to a one-count Superseding Information stating a violation of law. The terms of the agreement, which the Board adopted, provided for Mr. Phillips to be suspended from participation in the nuclear industry for a period of time.

MEMORANDUM AND ORDER
(Dismissal Pursuant to Agreement)

On September 14, 1995, the parties to the above-captioned proceedings, Hartsell Phillips (Phillips) and the Staff of the United States Nuclear Regulatory Commission (Staff), informed the Atomic Safety and Licensing Board ("Licensing Board") of the following developments concerning this matter:

First, on June 5, 1995, Mr. Phillips pled guilty to a one-count Superseding Information stating a violation of law, related to the matters that are the subject

of this proceeding. A copy of the United States District Court's Order of June 6, 1995, adjudging Mr. Phillips to be guilty and convicting him of the count charged in the Information, is attached. Sentencing of Mr. Phillips was conducted by the Court on August 22, 1995, in accordance with the Court's Order of June 6, 1995.

Second, the parties have reached an agreement in settlement of this proceeding. Accordingly, we approve of the stipulation in the agreement and provide the requested relief.

ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 19th day of September 1995, ORDERED that:

1. Hartsell D. Phillips, Jr., is permitted to withdraw his request for hearing on the Staff's "Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately)," dated March 10, 1994, and he is dismissed as a party in the proceeding pertaining to that Order;
2. The attached Stipulation is adopted as an order of this Board; and
3. The proceeding is dismissed, with prejudice.

THE ATOMIC SAFETY AND
LICENSING BOARD

Jerry R. Kline
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland

STIPULATION FOR SETTLEMENT OF PROCEEDING

THIS AGREEMENT is made by and between Hartsell Phillips ("Phillips") and the Staff of the United States Nuclear Regulatory Commission ("NRC Staff" or "Staff"), to wit:

WHEREAS Logan General Hospital, Logan, West Virginia ("Logan" or the "Licensee"), holds License No. 47-19919-01 issued by the NRC pursuant to 10 C.F.R. Parts 30 and 35, which license authorizes possession and use of byproduct material in accordance with the conditions specified therein; and

WHEREAS Phillips was employed by Logan, commencing in January 1991, as Chief Technologist, Radiation Safety Officer ("RSO") and Chairman of the Radiation Safety Committee ("RSC"), with responsibilities, *inter alia*, involving compliance with NRC requirements for radiation protection, until a date on which his employment was suspended by Logan in or about February 1994; and

WHEREAS on March 10, 1994, the NRC Staff issued an "Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately)," 54 Fed. Reg. 13,346 (Mar. 21, 1994), based, *inter alia*, upon a finding that Phillips had engaged in deliberate misconduct in violation of 10 C.F.R. § 30.10, which caused the Licensee to be in violation of a number of NRC regulatory requirements; and

WHEREAS the Order prohibited Phillips, pending further action by the NRC, from participation in any respect in NRC-licensed activities, to include licensed activities of (1) an NRC licensee, (2) an Agreement State licensee conducting licensed activities in NRC jurisdiction pursuant to 10 C.F.R. § 150.20, and (3) an Agreement State licensee involved in distribution of products that are subject to NRC jurisdiction; and

WHEREAS on March 30, 1994, Phillips filed a "Request for Hearing and Answer of Hartsell D. Phillips" concerning the Order, pursuant to 10 C.F.R. § 2.202, in response to which adjudicatory proceedings have been convened and remain pending before an Atomic Safety and Licensing Board ("Licensing Board") at this time; and

WHEREAS the undersigned parties recognize that certain advantages and benefits may be obtained by each of them through settlement and compromise of the matters now pending in litigation between them, including, without limitation, the elimination of further litigation expenses, uncertainty and delay, and other tangible and intangible benefits, which the parties recognize and believe to be in the public interest; and

WHEREAS, pursuant to 10 C.F.R. § 2.203, the Staff and Phillips have stipulated and agreed to the following provisions for settlement of the above-captioned proceeding, subject to the approval of the Licensing Board, before the taking of any testimony or trial or adjudication of any issue of fact or law; and

WHEREAS Phillips is willing to waive his hearing and appeal rights regarding this matter, in consideration of the terms and provisions of this Stipulation and settlement agreement; and

WHEREAS the terms and provisions of this Stipulation, once approved by the Licensing Board, shall be incorporated by reference into an order, as that term is used in subsections (b) and (o) of section 161 of the Atomic Energy Act of 1954, as amended (the "Act"), 42 U.S.C. § 2201, and shall be subject to enforcement pursuant to the Commission's regulations and Chapter 18 of the Act, 42 U.S.C. § 2271 *et seq.*;

NOW, THEREFORE, IT IS STIPULATED AND AGREED AS FOLLOWS:

1. Phillips agrees to refrain from engaging in, and is hereby prohibited from engaging in, any NRC-licensed activities up to and including March 9, 1999, five years from the date of the NRC "Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately)," dated March 10, 1994. In addition to the definition of "NRC-licensed activities" set forth above, said definition is understood to include any and all activities that are conducted pursuant to a specific or general license issued by the NRC, including, but not limited to, those activities of Agreement State licensees conducted pursuant to the authority granted by 10 C.F.R. § 150.20.

2. For a period of five years after the above-specified five-year period of prohibition has expired, *i.e.*, from March 10, 1999, through March 9, 2004, Phillips shall, within 20 days of his acceptance of each and any employment offer involving NRC-licensed activities or his becoming involved in NRC-licensed activities, as defined above, provide written notice to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, of the name, address, and telephone number of the employer or the entity where he is, or will be, involved in the NRC-licensed activities, and a detailed description of his duties and the activities in which he is to be involved.

3. In the first notification provided pursuant to Paragraph 2 above, Phillips shall include a statement of his commitment to compliance with regulatory requirements and an explanation of the basis why the Commission should have confidence that he will comply with applicable NRC requirements.

4. The parties agree that, as an integral part of this Stipulation and upon execution hereof, and subject to the approval of this Stipulation by the Licensing Board, (a) Phillips will withdraw his March 30, 1994 request for hearing on the NRC Staff's Order of March 10, 1994, and (b) the parties will file a joint request for dismissal of the proceedings on that Order, with prejudice, it being

understood and agreed that the Staff will take no further enforcement or other action against Phillips in connection with that Order.¹

5. It is understood and agreed that nothing contained in this Agreement shall be binding on, or preclude lawful action by, any other Government agency or department, including, without limitation, the United States Department of Justice and/or the United States Attorney.

IN WITNESS WHEREOF, we set our hand and seal this *14th* day of September, 1995.

FOR HARTSELL PHILLIPS:

[signed]
Charles L. Woody
Counsel for Hartsell Phillips

[signed]
Hartsell D. Phillips, Jr.

FOR THE NRC STAFF:

[signed]
Sherwin E. Turk
Counsel for NRC Staff

¹ The parties recognize and agree that nothing in this Agreement shall be deemed to prohibit the NRC Staff from taking enforcement or other action (a) against Phillips for violation of this Agreement, or (b) against persons other than Phillips in connection with or related to any of the matters addressed in the Order of March 10, 1994, should the Staff determine, in its sole discretion, that it is appropriate to do so.

Directors'
Decisions
Under
10 CFR 2.206

DIRECTORS' DECISIONS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF ENFORCEMENT

James Lieberman, Director

In the Matter of

Docket Nos. 50-390
50-391TENNESSEE VALLEY AUTHORITY
(Watts Bar Nuclear Plant)

September 13, 1995

The Director of the Office of Enforcement denies a petition dated February 25, 1994, filed with the Nuclear Regulatory Commission (NRC or Commission) by George M. Gillilan (Petitioner), and supplemented by letters dated June 16, June 28, July 6, 1994, and February 24 and 28, 1995, requesting enforcement action pursuant to 10 C.F.R. § 2.206 (petition). The petition requested that the NRC: (1) immediately impose a \$25,000 per day fine on Tennessee Valley Authority (TVA) until all reprisal, intimidation, harassment, and discrimination actions involving the Petitioner are settled to his satisfaction, and (2) appoint an independent arbitration board to review all past DOL suits and EEO complaints filed against TVA concerning Watts Bar.

After an evaluation of the petition, the Director concluded that the Petitioner's claims are unsubstantiated and that enforcement action is not necessary at this time.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206**I. INTRODUCTION**

On February 25, 1994, George M. Gillilan (Petitioner) filed a request for enforcement action pursuant to 10 C.F.R. § 2.206 (petition). The Petitioner requested that the Nuclear Regulatory Commission (NRC or Commission): (1) immediately impose a \$25,000 per day fine on Tennessee Valley Authority

(TVA or Licensee) until all reprisal, intimidation, harassment, and discrimination actions involving Petitioner are settled to his satisfaction, and (2) appoint an independent arbitration board to review all past DOL suits and EEO complaints filed against TVA concerning Watts Bar. Since the latter remedy is beyond the scope of the Commission's authority, it was denied in a letter to Petitioner dated April 7, 1994, which acknowledged receipt of the petition.¹

Petitioner supplemented his petition by letter dated June 16, 1994, rebutting the Licensee's May 20, 1994 letter responding to the petition. On June 28 and July 6, 1994, Petitioner reiterated his allegation that the Licensee was continuing to discriminate against him and described the Licensee's actions to deny Petitioner his nuclear plant access security clearance. In a letter dated February 24, 1995, Petitioner stated that TVA's continued pattern of harassment and intimidation had resulted in Petitioner's being "blackballed" in the nuclear industry. In a letter dated February 28, 1995, Petitioner advised the NRC that he had been terminated by TVA.

II. BACKGROUND

As the basis for his February 25, 1994 request, Petitioner asserted that he had reported safety concerns to the Commission and that, as a result, TVA management had subjected him to continuous intimidation, harassment, discrimination, and reprisal actions, that his name had been placed on a blackball list that had been circulated nationwide preventing him from obtaining suitable employment outside of TVA, and that these actions by TVA had affected his mental and physical health. In a letter dated February 28, 1995, Petitioner asserted that TVA's pattern of harassment and intimidation had culminated in the termination of his employment with TVA.

III. DISCUSSION

Specific Allegations

Petitioner bases his requests for sanctions on his assertion that he was a victim of unlawful discrimination pursuant to 10 C.F.R. § 50.7. Petitioner alleges a general pattern of discrimination, and mentions several specific acts by TVA: (1) putting his name on TVA's list of whistleblowers (Petitioner's February 24, 1995 letter), (2) failure to select Petitioner for a position (Petitioner's June 16, 1994 letter), (3) denying him plant access by withholding his security

¹The letter also denied Petitioner's request for immediate action.

clearance (Petitioner's June 28 and July 6, 1994 letters), and (4) terminating him (Petitioner's February 28, 1995 letter).

The allegation that Petitioner was subjected to discrimination by having his name put on a list of whistleblowers² by TVA was investigated by the TVA Inspector General (TVA/IG) which concluded that the creation of this list was not discriminatory. Furthermore, the Department of Labor (DOL) investigated a complaint with respect to the same list filed by another individual and found that creation of the list of individuals who had filed complaints under section 210/211 of the Energy Reorganization Act (ERA) with DOL did not constitute discrimination (Case No. 90-ERA-024, Secretary of Labor's Final Decision and Order of Dismissal, July 3, 1991, slip op. at 4-6). The Staff finds that the inclusion of Petitioner's name on a list of ERA cases did not constitute discrimination or violate section 50.7.

Petitioner also alleges that he was blacklisted from the industry because the list discussed above was distributed nationwide. In Case No. 90-ERA-024 discussed above, the Secretary of Labor said that "the record contains no evidence that TVA disseminated these documents to the newspaper or to other outside sources," concluding that Petitioner did not establish a *prima facie* case that the TVA memorandum and accompanying list of ERA cases was used for a discriminatory purpose (*id.* at 4-5). Petitioner has not provided to the NRC evidence that shows that the list was used to "blackball" those on the list. Therefore, we are not able to find that the creation and alleged distribution of the list was discrimination against Petitioner or warrants the enforcement action requested by Petitioner.

With respect to TVA's failure to select Petitioner for a position for which he had applied, Petitioner's complaint on this matter (dated October 10, 1991) was dismissed by the Secretary of Labor as untimely filed (Case Nos. 92-ERA-046 and 50, Final Decision and Order, April 20, 1995, slip op. at 3-5). The TVA/IG investigated this complaint and found that Petitioner did not return phone calls or respond to a registered letter inviting him to schedule an interview for the position and, thus, the individual was not selected. The TVA/IG consequently concluded that the failure to select Petitioner was not discriminatory. Based on a review of the TVA/IG investigation and the limited information provided by the Petitioner, the NRC Staff concludes that Petitioner has not provided information that would show that he was discriminated against in this instance.

With respect to withholding Petitioner's security clearance, Petitioner filed a complaint with the DOL on September 1, 1994. On November 4, 1994, the DOL Area Director concluded there was no discrimination in that case and his ruling was not appealed by Petitioner. The TVA/IG investigated this issue

²The list was a status report of complaints filed by TVA employees with the Department of Labor.

and determined that Petitioner's security clearance was suspended following a psychological evaluation relating to fitness-for-duty issues and the TVA/IG concluded that the suspension was not discriminatory. After reviewing the TVA/IG investigation and information provided by the Petitioner, the Staff concludes that Petitioner has not provided information that would show that TVA's suspension of Petitioner's security clearance was discriminatory.

With respect to Petitioner's allegation of discriminatory termination in September 1994, on April 27, 1995, the DOL Area Director dismissed Petitioner's complaint as untimely filed. Petitioner appealed this finding and the appeal is pending before the DOL Administrative Law Judge (ALJ) (Case No. 95-ERA-026). The issue was investigated by the TVA/IG who concluded that Petitioner's termination was due to his arrest for carrying a concealed weapon. The NRC's Office of Investigations (OI) reviewed documentation from the DOL and TVA/IG on this matter and concluded that there was insufficient evidence to substantiate Petitioner's allegation that his termination was discriminatory (OI Case No. 2-94-042, April 24, 1995). Based on a review of documentation by OI, DOL, and TVA/IG, the NRC Staff concludes that there is not sufficient evidence to establish that TVA's termination of Petitioner's employment was discriminatory.

General Allegations

In addition to the specific acts of discrimination alleged by Petitioner, he also referred to a continuing pattern of discrimination by the Licensee against him. While such general allegations are difficult to investigate, the Staff decided to review all the Department of Labor complaints filed by Petitioner to assess the likelihood that there is some form of generalized discriminatory treatment of Petitioner that goes beyond the specific acts that he alleges in the petition. This broader review was undertaken as an attempt to evaluate Petitioner's otherwise unsupported general claim that he was subject to a continuing pattern of discrimination and to determine whether some action against the Licensee would be appropriate at this time.

TVA notes, in its May 20, 1994 response to the petition, that Mr. Gillilan has filed thirteen complaints with the Department of Labor (DOL). NRC's records reflect that some of these were filed as supplements to earlier complaints; only nine are distinct complaints. Three of these complaints deal directly with the specific acts of discrimination alleged by Petitioner, as discussed above. In addition, Petitioner filed several complaints with DOL dealing with allegations of discrimination not raised in his petition. These complaints allege a pattern of behavior purported to demonstrate that TVA has discriminated against Petitioner. They are addressed below.

Petitioner's complaint to DOL filed on March 2, 1989, was dismissed by the ALJ as settled. The Secretary of Labor disapproved that settlement because one of the conditions required that the record be sealed, a condition that is incompatible with the requirement to make records of discrimination complaints available to the public. The Secretary remanded the case to the ALJ (Case No. 89-ERA-040, Order to Submit Briefs, May 13, 1994, slip op. at 1) and a decision is pending. The DOL Area Director found no discrimination with regard to Petitioner's complaint of November 16, 1990, involving Petitioner's assignment to evening shift and alleged harassment and intimidation by a supervisor. The Area Director also found in that case that the complaint of violation of an earlier settlement agreement was untimely filed. This decision was appealed, assigned Case No. 91-ERA-031, and consolidated with Case No. 91-ERA-034. Ruling in both 91-ERA-031 and 91-ERA-034, the ALJ determined that certain of Petitioner's allegations did not involve discrimination and that the remainder were untimely filed. In accordance with a request by both parties to dismiss 91-ERA-034, the Secretary of Labor dismissed it but remanded 91-ERA-031 to the ALJ for further proceedings, including an evidentiary hearing, noting that in remanding this case, he reached no conclusions regarding the timeliness or the merits of the allegations.³ (Decision and Remand Order, August 28, 1995). A decision is pending in that case.

Petitioner's combined complaints received by DOL on November 17 and 26, 1991, and January 10, 1992 (combined with that received on October 10, 1991, Case No. 92-ERA-046) were dismissed by the Secretary of Labor, who found that Petitioner had failed to present an issue of material fact with respect to these complaints, and therefore had not demonstrated discrimination.⁴ In Petitioner's combined complaints of December 21 and 29, 1993, the DOL Area Director concluded there was no discrimination and the ruling was not appealed. Petitioner's combined complaints of June 10 and August 26, 1993, were originally found by the DOL Area Director to involve discrimination, but after appeal to the ALJ, the hearing was cancelled because Petitioner was deemed "not . . . mentally capable to withstand trial." (Case No. 94-ERA-005, Order Transferring the Record, January 23, 1995, slip op. at 1). A decision is still pending in this case, pending Petitioner's ability to resume the case at trial. In Petitioner's complaint of November 6, 1994, the DOL Area Director concluded that Petitioner's removal was not motivated by his protected activities; therefore there was no discrimination. The ruling was appealed and a decision is pending in that case. See Case No. 95-ERA-009.

³ The Secretary directed that the Acting Chief ALJ first review and decide whether to consolidate Case No. 91-ERA-031 with Case No. 89-ERA-040.

⁴ Note that while the Secretary combined the four complaints received October 10, November 17 and 26, 1991, and January 10, 1992, he addressed the October 10 complaint separately. See Case No. 92-ERA-046, Final Decision and Order, April 20, 1995.

Although Petitioner's complaints before DOL are numerous, the DOL findings thus far do not establish a pattern of continuing discrimination against Petitioner. After reviewing the status of Petitioner's DOL complaints, the NRC cannot conclude that enforcement action is necessary against the Licensee at this time. In accordance with its normal practice, the NRC will monitor those complaints that remain before DOL and consider the need for enforcement action based on the results of the DOL proceedings.

IV. CONCLUSION

Based on a review of the petition and supplemental submissions, the Licensee's response dated May 20, 1994, the report of NRC's Office of Investigations (OI Report No. 2-94-042), the results of the investigations of the TVA/IG, and the decisions of the Department of Labor on several of Petitioner's complaints, I have concluded that Petitioner has provided insufficient information or evidence to indicate that TVA has engaged in a pattern of harassment, intimidation, or discrimination against Petitioner in violation of section 50.7, or to warrant additional NRC investigation of general harassment and intimidation with regard to Petitioner. I conclude that Petitioner's claims of harassment, intimidation, and discrimination have not been substantiated. Accordingly, the request for daily civil penalties is denied.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission to review in accordance with 10 C.F.R. § 2.206(c). As provided by that regulation, the Decision will constitute final action of the Commission 25 days after issuance, unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR
REGULATORY COMMISSION

James Lieberman, Director
Office of Enforcement

Dated at Rockville, Maryland,
this 13th day of September 1995.