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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD
Glenn O. Bright
Dr. James H. Carpenter
James L. Kelley, Chairman

In the Matter of CAROLINA POWER AND LIGHT CO. et al. (Shearon Harris Nuclear Power Plant, Unit 1)	Docket 50-400 OL ASLBP No. 82-468-01 OL

Motion for Reconsideration of Order Served 1-15-85 (41G)

Wells Eddleman now moves the Board to reconsider its Order served 1-15-85 admitting Contention 41-G, and notifying workers concerning their ability to contact the Board privately concerning possible harassment, retaliation or intimidation. In view of both legal and practical difficulties known to be associated with cases of harassment, retaliation or intimidation, one must go beyond a narrow interpretation of that Order in order to obtain any useful results. In the event that the problems to be detailed below can be resolved by clarification of that Order, such clarification is requested.

In order to litigate the harassment issue usefully, (1) a pattern of harassment, intimidation, retaliation, etc. must be dealt with (Callaway, ALAB 740, 18 NRC 343, 346,(1983)); (2) and even to prove discrimination against Chan Van Vo for protected activities, circumstantial evidence concerning treatment of other persons in both similar and dissimilar situations to Van Vo's must

[1]Applicants and Staff were consulted by telephone when I came down with the flu and had no objection to all due dates before Feb. 4 being extended to 4 February 1985. The Board was informed of this.

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be produced and investigated; finally (3) the desirable action by the Board to notify workers concerning their ability to bring forward information concerning haxrassment, intimidation, retaliation, etc. is practically inadequate where such harassment or inttimidation may exist, and simply does not go x far enough or allow enough time to develop information concerning the full extent of harassment, intimidation, retaliation, etc. at the Shearon Harris plant. Further, additional resources are now available to me as an intervenor to assist in investigation of these matters, such that the Board's "limited resource" discussion (Order, pp 2-3) is less valid.

These main points are developed further below.

(1) Contribution to record (Order , pp 2-3): The Order appears to presume that I could not redirect resources to this contention -- the only other work going on right now is responses to summary disposition -- nor obtain additional assistance. The Order concedes that no "particular" expertise is requ'red to pursue such a QA contention.

The importance of the issue argues for special effort -- a "pattern" of QA flaws (e.g. Harassment, intimidation of those with safety concerns) would undermine the safety finding required for an operating license. Callaway, supra, at 346.

Similarly, in Byron (ALAB-770, 19 NRC 1163 (1984)) on appeal from an operating license denial, the Appeal Board agreed with the licensing board that "doubt" as to "whether construction defects of potential safety significance have gone undetected ..." precludes the granting of a license. Obviously, haxrassment or intimidation of persons bringing up safety concerns could prevent safety-significant problems from being corrected, and could and would chill the likelihood that others would raise such issues. Freedom from cost and schedule pressure (a likely reason for harassment of those bringing up safety

concerns, since such concerns take time and money to inspect and fix) is obviously necessary to a proper 10 CFR 50 Appendix B quality assurance program, and without freedom from harassment and intimidation of inspectors, the finding required by the Appeal Board in Byron (see above) cannot be made.

In Catawba (partial initial decision, June 24, 1984) at 159, it is stated that a "pattern" of retaliation could be the basis for license denial. In this case, Duke Power QA management discrimination against welding QC inspector "Beau" Ross for his and his crew's strict adherence to QA procedures and expression of safety concerns.

Thus the broader contention, 41-G as drafted, is more appropriate to consideration here. a "pattern" per the Callaway decision (ALAB 740, 18 NRC 343, 346) cannot be shown by what happened to Chan Van Vo alone. The "pattern of harassment" issue is critical to the safety of the Harris plant and development of a sound record requires it be investigated. As will be shown below, proper investigation of the case of Chan Van Vo by himself requires most of the same issues to be dealt with, and much evidence assembled that would be required for the broader contention. By forcing the single-worker issue to be heard first, the Order appears to make delay more likely in dealing with the ultimate issue of a pattern of harassment, intimidation, etc.. Chan Van Vo specifically alleged that other persons were also being discriminated against for safety concerns at Harris.

For example, in a 3-16-81 memo revealed in 1984 under FOIA 83-413 (p.2) (copy attached) it is stated "Finally after meeting with the inspector in the NRC trailer, which is in full view of the site manager's and the resident engineer's offices, the alleger stated that he was summoned to the QA Director's office where he was instructed, by the QA Director not to talk to NRC unless he cleared it first with him unless or the NRC inspector asked him a question. In this case the

alleger stated that he was instructed to answer in short and to the point. The alleger stated that the QA Director informed him that unless he follows these instructions he would be in trouble." The same FOIA file does not appear to reveal NRC followup to prevent such intimidation from recurring.

In addition to the above legal and factual reasons to pursue the harassment/intimidation issue as drafted in 41-G, I have also gained additional assistance since the Board order issued. Specifically I have the cooperation of the Government Accountability Project and Robert Guild (representative of GAP who also represents Chan Van Vo). GAP represented Chan Van Vo (and continues to) and is available to assist intervenors and the Board in developing a record on the pattern of harassment issue at Shearon Harris.

Guild was counsel in Catawba where a similar issue was developed through welding inspectors (Ross et al), in camera witnesses (Welder B et al), the foreman override issue, etc. The Board there received "pattern" evidence (though it ultimately rejected its significance in approving a license for the Catawba plants). GAP was involved in the investigations at Catawba. GAP's contribution elsewhere is well documented, eg. in Zimmer (order suspending construction, CLI-82-33, 16 NRC 1489 (1982) which credits GAP for work in showing a QA breakdown at that plant.

In conclusion, with this assistance I am able to devote most of my time and effort, and additional GAP resources, to the pattern of harassment issue -- this effort will be greater than went into any past contention, in terms of time devoted to it over the period available.

(B) Delay -- issue broadening.

The Catawba board has ruled that late filing"criteria are inappropriate for application to a contention that is 'late' for reasons wholly beyond the intervenors control. For example, the last criterion concerns the extent it will broaden the issues or delay the proceeding. An issue based on new information will almost necessarily broaden the issues and it may well delay the proceeding." (Catawba, memorandum and Order March 5, 1982). The production of Chan Van Vo's affidavit was in no way under my control -- nor have any of his other actions been. As soon as I had the information in hand, I brought it to the hearings, and promptly prepared contentions.

The delay issue here is less significant because the fuel load was delayed by the Applicants until March, 1986. However, the Board's approach will likely complicate this issue by increasing delay -- see below. In any event, the issue has only been "broadened" to encompass the critical Callaway standard cited above. Assurance the plant is properly built is absolutely critical to the required safety finding for any operating license. The importance of the issue to safety justifies the "broadening".

However, the Board's 2-step approach increases the likelihood of delay. Under it, a rushed hearing on the question of Chan Van Vo by himself (including some document falsification issues) will happen before the scheduled emergency planning hearing. A second hearing on the broader issue of a pattern of harassment would presumably come later -- i.e. closer to the fuel load date, which prejudices the situation against later contentions.

Moreover, the existence of discrimination against Van Vo will require broader evidence to prove anyway (see below), and could better be developed on a schedule for a hearing in summer 1985-- a schedule that would allow a pattern of harassment contention.

Under the Board's present schedule, if GAP and I prove Van Vo's case by itself, we lose several months of discovery time, and then delay of fuel load by the time adequate further discovery can be completed (and summary disposition motions, etc. dealt with) will be a reason to deny or limit the"pattern" contention. This is at best inefficient and at worst will effectively deny the timely-filed "pattern" contention which alone can affect the result of the case --

But proof of even a "narrow" contention concerning Chan Van Vo himself requires discovery and proof of retaliatory motive through circumstantial evidence of a "pattern" of harassment by CP&L (et al) at the Harris plant, or of disparate treatment of Van Vo compared to others similarly situated. In order to know if Van Vo was discriminated against because of his safety concerns, I must be allowed to develop evidence concerning other persons with safety concerns, other employees' treatment by CP&L (a) when they had safety concerns, and (b) when they evidently did not, but were otherwise in similar situations to those Chan Van Vo was in.

What is to be proved under 41-G as admitted is essentially violation of employee protection provisions of the Energy Reorganization Act, 42 USC 5851 as implemented by NRC regulations 10 CFR 50.7.

To do that, I must show Van Vo (1) engaged in protected activity -- which includes making internal safety complaints. Mackowiak V. University Nuclear Systems 735 F. 2d. 1159, 1163 (9th Circuit 1984[2]). It is admitted Van Vo made safety complaints about pump/pipe fitup, hanger reinspection, void purchase order, etc. It is not clear if his having made safety complaints to senior CP&L officials (Utley, MacDuffie) is being directly denied.

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[2]The Fifth Circuit disagrees and says you must participate in an NRC proceeding to be protected. Brown and Root V. Donovan ___ F 2d 1225, 5th Circuit, 1984)

In any event, some protected activity is shown.

(2) That Van Vo was discriminated against. Action taken against him included paclacing him on probation, and later firing him.

(3) That these actions against him (see (2) above) were taken because of protected activity.

#3 requires proof of "retaliatory motive" (unless there is written evidence or a confession that 'we fired him for complaining' or something to that effect -- information CP&L already claims does not exist).

You can prove the retaliatory motive by circumstantial evidence (approved in Ellis Fischel State Cancer Hospital V. Marshall, 629 F 2d 563, 566, 8th Circuit, 1980). There is no requirement that the complainant have "personal" or "direct knowledge of retaliatory motivation" (Id.)

Therefore I and those assisting me must be free to show motive circumstantially by discovering "pattern" and"disparate treatment" evidence -- such as, how did CP&L respond to safety complaints by others; who else may CP&L have harassed; how has CP&L treated other employees similarly situated to Van Vo, who did not raise safety concerns? etc.

This is a "dual motive" or pretext case, that is, CP&L says Van Vo was fired for poor performance, he says it was discrimination for his raising safety concerns. CP&L must prove that the same action would have been taken against Van Vo even if he didn't engage in protected activity (i.e. raising safety concerns). CP&L bears the risk that "influence of legal and illegal motives cannot be separated" Mackowiak, 735 F. 2d at 1164.

Sorting all this out will require discovery comparable to that required for the original contention 41-G. It will have to look at the treatment of other people who raised safety concerns, and at others

who did not, and at others who may have been discriminated against for raising safety concerns. The Board has not allowed enough time to do this (I would have filed discovery last week except for being incapacitated by the flu). Therefore the appropriate relief is to admit the original contention 41-G and allow discovery to be filed through 1 April 1985, with hearing if necessary scheduled in the same period now held for emergency planning contentions.

Restriction to "the reasons particular personnel actions were taken against a particular individual" (Order, p.4) limited to "particular incidents" only still requires proof of circumstantial evidence for the retaliatory motive required to prove the contention.

To repeat, efficiency also supports the admission of original 41-G since the Board would consider a broader harassment (pattern) contention if Van Vo's allegations are substantiated (Order, p.4) and since proof of Van Vo's allegations amounts to having proof of patterns of treatment of persons by CP&L, those with and those without safety concerns they raised.

A similar problem affects the Board's treatment of contention 41-C, falsification of documents (Order, p.6). Treating this as within the Van Vo allegations limits it so much as to make it not very useful: If it deals with only documents Van Vo himself saw, so what? The real question is whether other documents were falsified. Van Vo's affidavit provides enough basis to go into that -- to see if there are other falsified documents (e.g. nonexistent purchase order numbers, other false references) on documents Van Vo did not see himself. To limit the question to just what Van Vo saw or was directly involved with destroys the usefulness of the contention in developing a sound record. We know a false purchase order number was put on some hanger packages-- a violation of 10 CFR 50 Appendix B. What we need to know is the extent of such violations/falsification. 41-C should therefore be admitted.

(C) Notice to workers.

It is clearly a good idea to seek evidence of workers having been harassed, intimidated, or retaliated against at Harris. But experience shows that such notice as is provided is almost certain to fail to bring out most (if not all) of the workers who have such complaints.

(i) Evidence of harassment for raising safety concerns must remain hidden or the harassment has not been effective. Thus by its very nature any harassment will include covering up the fact of harassment, e.g. by intimidation. Harassment and intimidation work -- they chill the discovery of not just safety problems, but also of their own existence. Practices like locating the NRC trailer in full view of senior site management certainly do not help this situation.

(ii) it is the absence of harassment or initimidation that must be shown for the plant to be OK. "If the NRC's regulatory scheme is to function effectively, inspectors must be free from the threat of retaliatory discharge for identifying safety and quality problems." Mackowiak, supra, at 1163.

> Common sense tells us that a retaliatory discharge of an employee for "whistleblowing" is likely to discourage others from coming forward with information about apparent safety discrepancies." Callaway, ALAB-527, 9 NRC 126, 134 (1979)

This cannot be proved just by no one eagerly coming forward with evidence of harassment, because as noted under (i) above, any harassment would discourage such persons from coming forward.

(iii) there are clear practical dixxfficulties with the Board's approach of posting a notice in legalistic language:

in Catawba, because of feared retaliation, workers with safety concerns (including harassment, i.e. foreman override, etc.) did not heed Board notice and come forward, even when they knew of the notice and knew hearings were going on. For example, "Welder B" only voiced concerns when directly asked by NRC (or) other investigators.

In order to accomplish its evident goal of bringing out any evidence of harassment or intimidation at Harris, therefore, the Board must adopt much more aggressive measures to inform Harris workers of their rights and bring fowward evidence of any harassment.

In particular, a new notice including the Board's information and the facts that (a) harassment, discrimination, retaliation, etc. are against the law (b) complaints about such acts against workers can be made to the Dept of Labor, which will investigate, headlined as appropriate, e.g. We Seek Evidence of Harassment Against People Raising Safety Concerns at Shearon Harris, should be very widely distributed, e.g. by all of the following:

(i) NRC press release

(ii) direct distribution to all workers at the Harris site under Board order

(iii) approval for intervenors to mail the notice to workers at home addresses provided under protective order.

The Board must also allow the intervenors appropriate means (including discovery under protective order) to seek the identification and location of persons having information about harassment/intimidation and so on at Harris. The Board implicitly concedes such evidence from workers is relevant to the contention 41-G but uses what past experience has shown to be fatally deficient means for obtaining it.

Also, the March 1 deadline should be eliminated -- it is artibtrary and capricious and fundamentally unfair to intervenors who can only be held responsible for raising timely claims based on evidence within the intervenors' knowledge. Further, if harassment exists and that prevents workers from coming forward (as at Catawba) the intervenors cannot be held responsible for that effect (nor can the utility or others be rewarded by a "statute of limitations" on illegal behavior).

The March 1 deadline assumes 100% effectiveness of a notice (similar notice at Catawba appeared to be more like zero percent effective, and precludes proof of the claim I have raised (of a pattern of Harassment -- 41-G) unless persons who I have no control over will voluntarily come forward on their own and perhaps against intimidation. Thus I am being prejudiced by the inaction of others under a condition (i.e. simple, legalistic-language notice) which is known to be not very effective -- which is arbitrarily established. In fact, there is no "statute of limitation" on violation of NRC regulations as far as I am aware.

The March 1 deadline is thus inconsistent with the Callaway (supra) decision requiring evidence of a pattern to affect an operating license. It is also against the Byron decision (supra) which requires supplementation of the OL record with relevant new evidence (in that case, the licensee's evidence) and disapproves closing off the record arbitrarily. In view of this case law and the practical difficulties outline above in getting people who in fact allege they are victims of harassment or intimidation to come forward, the March 1 deadline is plainly arbitrary and capricious, and evidence of harassment or discrimination before that date should be accepted when and as it becomes available.

CONCLUSION

/For the reasons given above, the Board should (1) admit contentions 41-C and 41-G as written (2) permit discovery on both until April 1, 1985 (last day for filing requests) (3) rescind its announced intent to ignore evidence of harassment prior to 1 March 1985 where such harassment is not brought to the Board's attention prior to that date, and (4) take additional strong measures to inform Harris site workers of their rights to be free from harassment and intimidation and their rights to inform the Board, NRC Staff and intervenors about such harassment/intimidation.

Of counsel: Robert Guild

4 February 1985 Wells Eddleman

Wells Eddleman

UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION II
101 MARIETTA ST., N.W., SUITE 3100
ATLANTA, GEORGIA 30303

MAR 16 1981

SSINS 50-400, 50-401
50-402, 50-403

MEMORANDUM FOR: C. Alderson, Director, Enforcement and Investigation, RII

THRU: C. E. Murphy, Chief, Engineering Inspeection Branch, RII
A. R. Herdt, Section Chief, Engineering Inspection Branch, RII

FROM: N. Economos, Reactor Inspector, MPS, Engineering Inspection Branch, RII

SUBJECT: ALLEGATIONS - ACTIVITIES OF QA PERSONNEL AT SHEARON HARRIS NUCLEAR PLANT (DOCKET NOS. 50-400, 50-401, 50-402 and 50-403)

During a routine inspection of the Shearon Harris Nuclear Plant conducted between February 18-20, 1981, two of three individuals interviewed reiterated certain allegations which they had made to the NRC resident inspector earlier. A description of these allegations were as follows:

1. Individual "A" alleged that:

   a. Individuals without previous experience in hanger inspections are given a short how-to course in this area; upon successful completion of the course they are given a 90-day temporary qualification and assigned to the hanger inspection crew. The alleger questions the competancy of these individuals and the adequacy of their work.

   b. Certain welding inspector candidates were given copies of proficiency examinations for home study and then allowed to take the examination until a passing grade was attained.

   c. The site QA Director rewrites (sanitizes) all deficiency disposition reports (DDRs) generated by field QA personnel before approving them for further action.

   d. The site QA Director discusses with Construction Inspection (CI) Supervisor problems identified by field QA personnel and in many cases corrective action is taken without generating NCRs or DDRs as required by site procedures.

   e. QA personnel are demoralized because the QA Director does not support them in disputes with engineering and/or management.

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2. Individual "B" alleged that:

a. The QA Director has ordered him to confine his activity to areas within his discipline only. That is if during the inspection of an electrical pull box or a cable tray, he identifies a welding and/or a mechanical problem and finds that the electrical aspects are acceptable, he is to restrict his comments to the electrical aspects only and make no comments on the other problems.

b. Repeated items 1.d and 1.e above.

c. The QA Director has instructed him not to issue NCRs for QC inspection reports found to contain discrepancies. Instead he was instructed to bring the problem to the attention of the responsible party and have it corrected. The following is an example used to support his point: Form No. TP-09 Concrete Embedded Electrical Equipment Inspection Form, Pour No. 1-ACSL-305-005 1/14/81 and 1-ACSL-305-007 2/4/81.

Finally after meeting with the inspector in the NRC trailer, which is in full view of the site manager's and the resident engineer's offices, the alleger stated that he was summoned to the QA Director's office where he was instructed, by the QA Director not to talk to NRC unless he cleared it first with him or unless the NRC inspector asked him a question. In this case the alleger stated that he was instructed to answer in short and to the point. The alleger stated that the QA Director informed him that unless he follows these instructions he would be in trouble.

for N. Economos

Contact: N. Economos
(Ext. 4667)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of CAROLINA POWER & LIGHT CO. Et al.) Docket 50-400
Shearon Harris Nuclear Power Plant, Unit 1) O.L.

CERTIFICATEOF SERVICE

I hereby certify that copies of Diesel Generator Contentions and Info and of Motion for Reconsideration of Order served 1-15-85 (41G), and of Discovery on 41-G (1st set) to Apps & to Staff (limited service per oral order)

HAVE been served this 4** day of February 1985, by deposit in the US Mail, first-class postage prepaid, upon all parties whose names are listed below, except those whose names are marked with an asterisk, for whom service was accomplished by discovery on 41-G delivery by hand this date to CP&L legal dept in Raleigh NC

**under agreement of counsel for Staff and Applicants of which the Board is aware.

Judges James Kelley, Glenn Bright and James Carpenter (1 copy each)
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Washington DC 20555

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