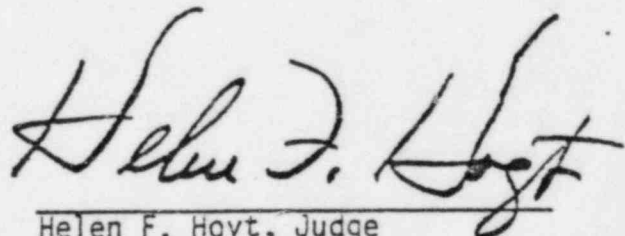
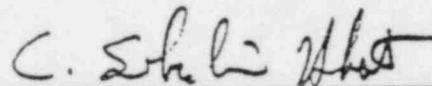


REPORT TO THE CHAIRMAN
on an investigation into
ALLEGATIONS OF THOMAS APPLGATE
CONCERNING THE CONDUCT OF
THE OFFICE OF INSPECTOR AND AUDIT



Helen F. Hoyt, Judge
Atomic Safety and Licensing
Board Panel



C. Sebastian Alost, Attorney
Office of the General Counsel

July 12, 1983

8312010229 XA

I. INTRODUCTION

By Memorandum dated May 6, 1983, Chairman Nunzio J. Palladino directed Judge Helen Hoyt and Sebastian Aloit to conduct an investigation into allegations made by Thomas W. Applegate concerning deficiencies and possible improprieties on the part of the Director of the Office of Inspector and Audit (OIA), and that office, in response to prior allegations made by Mr. Applegate regarding the Zimmer Nuclear Power Station (Zimmer).¹ The specific deficiencies and improprieties were detailed in a memorandum prepared November 16, 1982 by Martin G. Malsch, Deputy General Counsel. That memorandum, in turn, was based on an interview of Mr. Applegate and attorneys for the Government Accountability Project on November 5, 1982 by members of the Office of the General Counsel.²

In his memorandum of May 6, the Chairman directed that a determination be made whether the Director of OIA and that office made a good faith effort to discharge their responsibilities in evaluating the adequacy of Office of Inspection and Enforcement Investigation Report No. 50-358/80-09 (July 7, 1980).

II. CONDUCT OF INQUIRY

As a preliminary matter, we³ began our investigation with an examination of the relevant depositions and documents generated in the course of Applegate v. NRC., U.S.D.C., D.D.C. No. 82-1829, a lawsuit filed by the Government Accountability Project (GAP) in the name of Thomas Applegate and challenging the NRC's failure to identify and disclose documents relevant to OIA's 1981 investigation into the adequacy of IE Investigation Report No. 50-358/80-09 (July 2, 1980). Relevant documents in the files of OIA and Region III were also reviewed.⁴

¹ Memorandum from Nunzio J. Palladino, Chairman, to Helen F. Hoyt and C. Sebastian Aloit (May 6, 1983), attached hereto as Exhibit A.

² Memorandum from Martin G. Malsch, Deputy General Counsel, to Chairman Palladino (November 16, 1982), attached hereto as Exhibit B.

³ Ruthanne Miller, a law clerk with the Atomic Safety and Licensing Board Panel (ASLBP), assisted in the development of the record and in the analysis of that record.

⁴ A list of the significant documents reviewed in the course of this inquiry is attached as Exhibit C. Where reference to these documents is made in the body of this report, the relevant document is identified in terms of the document number reflected in Exhibit C.

Among the more significant files examined was the telephone logs of James Cummings and his secretary for, OIA file 81-18, the investigative file pertaining to OIA's investigation into the adequacy of IE Report No. 50-358/80-09 and OIA file 81-39, and the Zimmer criminal investigation file.⁵

Since several persons involved in the Applegate affair were agency employees at Region III headquarters, we travelled to Glen Ellyn, Illinois, for interviews. On May 16-17, 1983 we conducted five interviews of region personnel. Several interviewees had retired from government service but agreed to meet with us. At the request of the Regional Administrator, we permitted Stephen Lewis, Regional Counsel for Region III, to attend the interview of the region's employees.⁶ However, Mr. Lewis was not permitted to participate in the interview.⁶ The interviews we conducted and an examination of Region III documents occupied two days.

On June 2, 1983 we travelled to Great Lakes Naval Station, Illinois, to interview former Region III Investigator, James McCarten, now employed by the Naval Investigative Service. We examined documents still in his files and accepted his representation that the balance of his documents were either in Region III files or with a grand jury at Cincinnati.

Interviews and document examination at Washington was conducted in the ASLBP office at East West Tower or at the General Counsel's offices.⁷

⁵ We originally requested OIA file 81-39 on two occasions from OIA. On both occasions, we were advised that the file was in the Office of the General Counsel. We subsequently learned that the file was not in OGC but was in OIA's files. When advised of this, OIA provided 81-39 on June 13, 1983. Because of its poor condition, material documents could not be located. Mr. Cummings and Mr. John Sinclair, in addition to several clerks and Mr. Cummings' secretary, worked to bring the file into a usable condition. The accepted explanation was that the file had been used by several groups who had dismantled the materials to make copies and had not reassembled the materials properly.

⁶ The Regional Counsel requested that copies of the Region III interviews be made available to the region and we agreed. Following our transmittal of this report, we will initiate steps to honor our agreement.

⁷ Thomas Applegate was not among the individuals interviewed. Foremost in our decision not to interview Mr. Applegate was our

Interviews were tape recorded, taken by a court reporter, or in one case, transcribed from notes. Two additional interviews were conducted over the telephone and either transcribed from tape or from notes. In sum, our investigative effort included interviews of twenty persons, comprising upwards to 50 hours of interviews, with varying degrees of knowledge about the Applegate affair and the investigations into various of his allegations.⁸ Several of these witnesses were re-interviewed. Particular investigative emphasis was placed on the six allegations contained in the Malsch memorandum to Chairman Palladino dated November 16, 1982 (Exhibit B). Moreover, since the documents listed in Exhibit C reflect only those documents we determined to be significant to our understanding of this matter, they are by definition only a subset of the entire range of documents we reviewed. Where the same document appeared in more than one file, we attempted to determine the importance of that document's position in a particular file. We noted the changes that occurred in the August 7, 1981 OIA report and attempted to identify the reasons for the changes. All together, we sought to ensure that this investigation would look at every item deemed important to a fair and complete report on the conduct of OIA during 1980-82. We did not attempt to structure artificially the investigation but allowed our efforts to follow the path laid down by the information we developed.

belief that an investigation of the Applegate allegations would not be furthered by permitting the subject to define the terms and focus of that investigation; hence, we made a judgment to avoid an interview with Applegate. If we were to fairly evaluate the six allegations as stated by Applegate in November 1982, we could not permit an expansion of them in June 1983, which was a possibility if we interviewed Applegate at this time. Moreover, Thomas Devine, a principal participant in the November 4 interview for GAP, reviewed Exhibit B and pronounced it to be "an excellent job of summarizing the issues that we raised." Devine Interview at 9. During the course of the investigation, any ambiguities in Applegate's November 4, 1982 interview were clarified by representatives of GAP or other interviewees.

HISTORICAL BACKGROUND⁹

While involved in a divorce investigation for a client, Thomas Applegate, a private investigator employed by Confidential Service, became aware that an employee at the Zimmer Nuclear Power station in Moscow, Ohio, was involved in timecard cheating. Applegate contacted Cincinnati Gas and Electric Company (CG&E) with the information and obtained a thirty day contract on December 10, 1979 to investigate on-site timecard cheating. During the course of this on-site investigation in late December 1979 and early January 1980, Applegate obtained information which, in his view, established criminal conduct and improper construction practices. While Applegate allegedly related this additional information to his management contact at CG&E, but he was uninterested. In early January 1980, CG&E failed to renew Applegate's contract. A short time later, Applegate left the employ of Confidential Service.

Sometime in January or February of 1980, Applegate attempted to advise various governmental offices of the information he possessed regarding Zimmer. Among the offices contacted was the F.B.I., the U.S. Attorney's office in Cincinnati, and the Washington office of Senator Glenn. The F.B.I. and the U.S. Attorney's office took no action in response to Applegate's contact and Senator Glenn's office provided Applegate with the name and telephone number of James Cummings, Director of the Commission's Office of Investigation and Audit (OIA). Applegate contacted Mr. Cummings at some point during the third week of February. When he became frustrated with OIA's response, Applegate contacted the Office of then Chairman John Ahearne on February 27, and was referred to the Office of Inspection and Enforcement. On February 28, 1980, Region III contacted Applegate by telephone, and arrangements were made to conduct an interview on March 3, 1980. At this subsequent interview, Applegate made a number of allegations, but several were determined by NRC investigation to fall outside the NRC's jurisdiction. On March 11, 1980 a letter was sent to Applegate noting that three of his allegations were within the NRC's jurisdiction and that an investigation would be initiated. The investigation took place during the periods April 7-9, 30 and May 1-2, 1980. This report, sometimes called the Phillip Report

9

In order to assist in our understanding of this matter, a general chronology of events was prepared. While the chronology was based on documents reviewed in the course of this inquiry, no attempt was made to verify all dates or information reflected. Since the chronology was intended only as a general reference tool, it is neither exhaustive nor all-inclusive. A copy of the chronology is attached as Exhibit E.

and formally titled IE Investigation Report 50-358/80-09, was issued July 7, 1980.

After reviewing the Phillip Report, GAP filed a Petition with the Special Counsel of the Merit System Protection Board in December 1980. Document 9. GAP alleged that Phillip and the NRC were negligent in the scope and manner of the investigation and submitted nineteen additional allegations about Zimmer which, in GAP/Applegate's opinion, required investigation. As a result of the Petition, a new investigation began in January 1981. In a memorandum dated December 15, 1980, the Chairman directed OIA to investigate the adequacy of the Phillip Report, Document 8. See also, Document 10. The Chairman also advised OIA that IE would be conducting a contemporaneous investigation into GAP/Applegate's additional nineteen health and safety allegations.

Unrelated to Applegate allegations were the concerns expressed by a former QC Inspector at Zimmer to the Resident Zimmer Inspector on December 9, 1980. These concerns dealt with the adequacy of the Zimmer QC program; the Kaiser QA manager's improper handling of non-conformance reports, transfers of QC Inspectors, and inadequate QC staff support. While preliminary investigation into these allegations had begun sometime in December 1980 or January 1981, further investigation was held in abeyance pending completion of IE's investigation of the GAP/Applegate allegations. McCarten Interview at 118-19.¹⁰

The Region III investigation of the GAP/Applegate allegations proceeded continuously from January 1, 1981 nearly non-stop until April 1981. Region III second investigation report, ultimately issued November 24, 1981, served as a basis of an enforcement action against CG&E. IE Report No. 50-358/81-13 (November 24, 1981). Based on information uncovered prior to the GAP/Applegate Petition and during its 1981 investigation, Region III initiated a second phase investigation at Zimmer. That investigation, focusing on the apparent total breakdown of the Zimmer QA/QC program, is still incomplete. OIA, for its part, initiated a criminal investigation at Zimmer around March or April of 1981.

While initially pleased with OIA's report, GAP and Applegate began to receive information which suggested impropriety on the part of James

¹⁰ During the course of his interview, McCarten was asked to review and comment on several documents. Those documents were in part identified by numbers assigned based on the status of the record at that time. Subsequently, additional documents were added to Exhibit C, thereby changing the relevant numbers. The correct document numbers are reflected in a memorandum attached to McCarten's interview.

Cummings in conducting OIA's investigation and in editing the OIA report. As a result, they attempted to obtain information on OIA's investigation through the Freedom of Information Act.¹¹ On August 16, 1982, Applegate wrote to Chairman Palladino complaining that the NRC staff had lied to him and that there was an attempt to cover up the problems at Zimmer. OIA Director Cummings responded to the letter on September 20, 1982. Document 132. Applegate followed this with a call to the Chairman's office on September 23, 1982 and spoke with Norm Haller. During the conversation Applegate made allegations that it was Cummings who was responsible for a cover up at NRC. Document 135a.

On November 4, 1982, pursuant to Commission direction, Martin G. Malsch and Richard Levi of OGC interviewed Applegate along with Lynne Bernabei and Thomas Devine, GAP attorneys. Attachment 1 to Exhibit B. It is the allegations contained in Malsch's interviews that form the basis of this report.

IV. ANALYSIS OF ALLEGATIONS¹²

"(1) Cummings failed to appreciate the seriousness of Applegate's concerns and brushed Applegate off"

In his Petition to the Special Counsel, Applegate alleged that Cummings "sat on" his information concerning the Zimmer Nuclear Power Station. Document 9 at 16. See also Applegate Affidavit at 13, attached as Exhibit 3 to Document 9 ("For a month [Cummings] told me he was 'looking into' my concerns, without any further explanation."). Applegate expanded on this allegation of malfeasance or nonfeasance in his November 4, 1982 interview with members of the Office of the General Counsel. Attachment 1 of Exhibit B at 1-2. Specifically, Applegate alleged that he had several telephone conversations with Cummings over a three or four week period in January 1980. The last conversation ended, according to Applegate, when Cummings stated (1) that he was tired of the phone calls, and (2) that any concrete evidence in Applegate's possession should be submitted in writing. It was at this point that Applegate directed his information to the office of then-Chairman Ahearne. Applegate asserted that during this period, "Cummings did not

¹¹ GAP and Applegate ultimately filed suit in June 1982 under the Freedom of Information Act to obtain additional information. Applegate v. NRC, U.S.D.C., D.D.C. No. 82-1829. The conduct of employees giving rise to this lawsuit was beyond the scope of this inquiry.

¹² In the interest of simplicity, Applegate's allegations are reproduced exactly as stated in Exhibit B and are analyzed in the order presented there.

seem to appreciate the seriousness of the matter" and "wrote him off as a kook."

While uncertainties remain regarding the exact number of conversations,¹³ it is undisputed that Applegate and Cummings communicated on at least one occasion in early 1980. Exhibit F. However, the record establishes that the period of substantive communication between Applegate and Cummings did not exceed a span of eight days between February 15-22, 1980.¹⁴ Document 9 at 3, 16 and Exhibit 5; Document 67 at 8; Exhibit F.

¹³ As noted, Applegate alleged the existence of several telephone conversations. In a memorandum prepared in August 1981, Cummings acknowledged only one such conversation. Exhibit F at 2, also identified as Document 66. That conversation, according to Cummings, occurred two or three days after February 19, 1980, the first date Applegate is reflected on his secretary's calendar. Bowden Interview. However, Applegate's telephone records document four telephone calls to the NRC; three to the general agency number and one to the Chairman's office on February 27, 1980. Exhibit 5 to Document 9. The initial three telephone calls were on February 15 (apparently 14 minutes), 19 (12 minutes) and 22 (6 minutes), 1980. Since Cummings' secretary recalls several unsuccessful calls which originated outside Applegate's residence and several which were operator-assisted, person-to-person, Applegate's telephone records must be viewed as the minimum number of contacts with the NRC. It is impossible to determine, however, whether all of these contacts were with Cummings. Nonetheless, Cummings has conceded that it is possible that he had more than one conversation with Applegate (Cummings Interview at 7 and 13) and that his first conversation with Applegate ran between 10-15 minutes. Based on this, we find it likely that Applegate and Cummings also spoke on February 19, 1980.

¹⁴ Applegate advised Phillip on March 3, 1980 that he obtained Cummings' name and phone number from Senator Glenn's office. Document 67 at 8. A review of Applegate's telephone records shows a telephone call to the Capitol Hill switchboard on February 15, 1980 immediately followed by a telephone call to the general NRC telephone number. As to the last date of possible substantive communication between Applegate and Cummings, both have acknowledged that the telephone call to the Chairman's office followed a weekend and that their last substantive conversation was before the weekend. Document 67 at 8; Exhibit F at 2-3. The last telephone call to the general NRC number documented in Applegate's phone records is Friday, February 22, 1980.

In direct response to this allegation, Cummings admits that he did not at the time appreciate the seriousness of what became known as the Applegate allegations. Cummings Interview at 18 and 21-23. However, he explains this lack of appreciation as the result of Applegate's failure to provide orally any substantive detail regarding health and safety problems at Zimmer. Id. at 21-22. Cummings further acknowledges that he tempered his response to Applegate in light of the FBI's lack of interest in Applegate's allegations and his personal evaluation of Applegate's reliability. Id. at 19, 21-22, and 24-25. Because of these factors, Cummings conceded that he saw nothing in Applegate's allegations "that lit a fire in my belly." Id. at 23. Notwithstanding this, Cummings maintains that he did not treat Applegate in a "cavalier fashion." Id. at 18; Exhibit G at 1. Rather, he committed to review any written reports Applegate might submit and, based on his recollection, Applegate agreed to consider this proposal over the weekend and call back. Id. at 22; Exhibit F at 2. Thus, it was his expectation of further communication with Applegate, not an attempt to brush him off, that lead to his inaction in February 1980. Indeed, it was the expectation that Applegate would call back, according to Cummings, that resulted in his failure to immediately memorialize Applegate's first contact in a written memorandum or otherwise refer Applegate to Headquarters IE. Cummings Interview at 22.¹⁵

After reviewing the record compiled in this inquiry, we cannot discount the possibility that Cummings and Applegate spoke on more than one occasion. Cummings himself now acknowledges this possibility. Cummings Interview at 13. Nor can we dismiss the possibility that Cummings did advise Applegate that he wanted Applegate's allegations and documentation in writing before he would act. Moreover, despite his expectation of further communication, some question can be raised regarding Cummings' failure to immediately reduce the substance of Applegate's initial contact to writing.¹⁶ Finally, while we accept Cummings' recollection of the substance of Applegate's communications (Exhibit F at 2) as reasonable,¹⁷ we find Applegate's numerous

¹⁵ Members of OIA stated that acceptable investigative practice generally calls for investigators to either memorialize citizen contacts or otherwise immediately refer the caller to the appropriate office. Sinclair Interview at 34; Fortuna Interview at 10-11.

¹⁶ Notwithstanding the reasonableness of this explanation, one consequence of Cummings' failure to immediately reduce Applegate's initial contact to writing is the possibility that his recollection of the events in August 1981 may have been "refreshed" by a review of Applegate's statements to Phillip as reported by the OIA report.

¹⁷ Applegate has acknowledged that he thought about Cummings' request

unsuccessful attempts to contact Cummings between February 15-27, 1980 to be the result of (1) Cummings' assumption of personal responsibility for contacts with Applegate and (2) Cummings' numerous absences from his office due to other responsibilities. Cummings has indicated that he routinely does not handle such telephone contacts, but did so here. Cummings Interview at 8. However, given the likelihood of his subsequent absences from the office, we believe Cummings should have at a minimum ensured the availability of a back-up OIA contact for Applegate. Indeed, had Applegate not contacted the Chairman himself, potentially significant information could have been unnecessarily delayed or lost to the Commission's regulatory program. Nonetheless, we cannot conclude that this pattern of failed communication between Applegate and Cummings was the result of any attempt by Cummings to dismiss Applegate or otherwise shield the Commission from adverse information regarding Zimmer.

"(2) OIA failed to monitor adequately IE's second investigation at Zimmer to ensure that all relevant evidence appeared in IE's report. Indeed, OIA had evidence showing that Cincinnati's Gas & Electric (CG&E) management knew of the problems at Zimmer but OIA did not provide this evidence to IE until IE's report was almost complete. IE's report failed to reflect that evidence and OIA knew that NRC's public statements regarding the lack of CG&E management involvement were false or misleading."

This allegation is the joint product of Applegate and attorneys for GAP, with Thomas Devine of GAP acting as the principal allexer. Specifically, they asserted that in the course of conducting its parallel criminal investigation at Zimmer, OIA had interviewed Phillip Gittings, Deputy QA Manager for Kaiser Engineering (KEI) at Zimmer, and William Schwiers, the former QA Manager for CG&E at Zimmer.¹⁸ OIA had

for something in writing over a weekend. Document 67 at 8. If, as Applegate alleges, his anger about being required to incur additional personal expense and resultant call to the Chairman was due to his belief that Cummings was brushing him off, we find it unlikely that he would have twice attempted to contact Cummings before calling the Chairman. Rather, we find it more plausible that Applegate did commit to contact Cummings after the weekend and became frustrated only when his attempts to re-contact Cummings on February 27, 1980 failed.

¹⁸ Devine also noted his view that the Schwiers interview was the most critical interview of the investigation up to that point. Yet, he asserted that the interview was conducted under strained conditions. He suggested that the NRC should look into those conditions and determine whether Cummings dictated those

also obtained an internal CG&E memorandum instructing KEI not to perform preoperational systems testing. The substance of these documents, in the allegers' view, contradicted IE's ultimate finding in 1981 that CG&E management did not know of the QA problems at Zimmer prior to their identification by the NRC in 1981. Yet, these documents were not transmitted to Region III by Cummings until November 8, 1981; just six days before the Region's report was issued. As a result, only the Schwiers interview was attached as an exhibit to the report and none of the documents were discussed in the body of the report. Moreover, these documents, according to the allegers, contradicted Region III's public statements on November 24, 1981 that CG&E management was unaware of the problems on-site. In the allegers' view, OIA must have known of the course of Region III's investigation and the substance of their findings and public statements because of the close cooperation between OIA and IE in conducting their respective investigations. Despite this knowledge, both OIA and Region III gave or permitted a deliberately misleading indication that CG&E management was not aware of the problems at the Zimmer site.¹⁹

The record developed in this investigation is devoid of any documentary evidence suggesting, much less establishing, that OIA was specifically assigned a monitoring function over Region III's 1981 investigation of the Applegate allegations.²⁰ Further all

conditions. Attachment 1 of Exhibit B at 4. We find the tone of this allegation to be baseless. The principal Region III investigator assigned to Zimmer was verbally briefed by OIA investigators immediately after Schwiers' interview. Although he believed at the time that an interview of Schwiers was premature and that the OIA investigators were not prepared for the Schwiers interview, he asserted that the "strained circumstances" of the interview were due to Schwiers personal situation at CG&E. McCarten Interview at 68-71. To assert, as GAP appears to do here, that Cummings may have dictated this situation carries, in our view, the conspiracy theory to an unreasonable length.

19 Devine further asserted that he raised this point with Cummings at the time the report was issued and the public statements were made. According to Devine, Cummings' only concern was that someone in OIA might be leaking information. Attachment 1 of Exhibit B at 4.

20 Chairman Ahearne's December 15, 1980 memorandum directing OIA to evaluate the adequacy of Region III's 1980 investigation cannot, in our view, be reasonably read to even implicitly authorize OIA to monitor Region III's parallel health and safety investigation. Document 8. Certainly Cummings did not read that memorandum to request OIA to monitor the Region III investigation. Document 10; Cummings Interview at 99-101.

interviewees were unanimous in their recollection that OIA did not have a formal monitoring function over Region III's on-going 1981 investigation and did not assume such a role. See, e.g., Cummings Interview at 26-27 and 99-101; Keppler Interview at 30; Fortuna Interview at 51-52; Sinclair Interview at 53; Schnebelen Interview at 74; but see Stello Interview at 59-60; and Thompson Interview at 18-20, where they recall OIA did attempt to monitor IE's discovery of information relevant to OIA's criminal investigation. Indeed, both Devine and Bernabei subsequently acknowledged that OIA did not have a specific assignment from the Chairman to monitor Region III's on-going investigative effort in 1981. Devine Interview at 28-29 and 32; Bernabei Interview at 35. Rather, they asserted that OIA's monitoring responsibility was, in their view, a function of OIA's overall audit function for the Commission, their "presence" at Region III, and the responsibility of a good manager to ensure that the mistakes of the 1980 investigation were not repeated in the 1981 investigation. Devine interview at 28-36; Bernabei Interview at 43.

While we agree that OIA had in 1981 and has today the authority to review and evaluate the adequacy of IE investigations on its own initiative,²¹ we do not believe that OIA's authority extends to monitoring and directing on-going health and safety investigations by IE. See generally, NRC Manual, Chapter 0113. Having concluded that OIA did not have such a direction from the Chairman and did not in fact assume such a monitoring function over Region III's 1981 investigation, we must further conclude that the allegation that OIA failed to adequately discharge this non-existent responsibility is without merit. We note, however, that much of the subsequent controversy regarding Region III's 1981 report may have been avoided had OIA vigorously pursued Region III's proposed handling of the health and safety implications of the false records issue.

Similarly, we find the allegation that OIA permitted or allowed IE to exclude information from its report in order to justify a finding that CG&E management was unaware of the problems at Zimmer by improperly delaying the transmittal of significant evidence to be unsupported by the record.²² While the formal transmittal of the Schwiers and Gittings interviews and the internal CG&E memorandum did not occur until November 18, 1981 (Document 94), the substance of those documents was revealed to Headquarters IE on September 16, 1981. Id.; Cummings Interview

²¹ Cummings acknowledges that OIA has the inherent authority to initiate audits of investigations without the need for specific Commission approval. Cummings Interview at 17 and 107. See also Fortuna Interview at 6-9.

²² According to Bernabei, this was the principal focus of the second allegation. Bernabei Interview at 35-37.

at 117-18 and 121. See generally, Thompson Interview at 7-9. More significant, James McCarten, the lead Region III investigator for Zimmer, was part of the team that interviewed Gittings, and was orally briefed by the OIA investigators concerning the substance of the Schwiers interview immediately after the interview took place.²³ McCarten Interview at 68-70. According to McCarten, it was his contemporaneous knowledge of the Gittings interview that made the immediate transmittal of OIA's summary unnecessary. Id. at 69. As to the Schwiers' interview, McCarten maintained that "[t]he Schwiers interview [Applegate and GAP] talk about says nothing. Schwiers admitted to nothing." Id. at 70. If, as discussed below, pertinent information was excluded from Region III's report suggesting CG&E knew of or participated in the breakdown of the Zimmer QA program, we cannot conclude that the exclusion was due to OIA's failure to transmit the Schwiers and Gittings interviews and the internal CG&E memorandum prior to November 18, 1981.

What role senior IE officials may have played in possibly excluding information from their November 24, 1981 report or public statements is generally beyond the scope of this inquiry. However, allegations have been received which maintain that relevant information in Region III's own files suggesting the presence of "hardware problems" at Zimmer and CG&E knowledge of the breakdown in the Zimmer QA/QC program was ignored or deleted by regional officials.²⁴ See generally, McCarten Interview. While we express no judgment on the merits of these allegations, our inquiry established, in our view, a hesitancy on the part of IE officials to pursue, even on a preliminary basis, potential criminal violations and a general lack of interest in the potential systemic causes of particular regulatory violations. For example, Charles Norelius, Director of the Division of Project and Resident Programs in Region III, stated in his interview that he and Mr. Phillip had talked about the need to investigate further whether QA managers or others had modified records and had concluded that "it was not worth [Phillip's] time to go back and pursue that further." Norelius Interview at 14. He went on to state that "... I did not view our primary purpose to be one of focusing on wrongdoing per se. *** [Mr. Phillip] concluded that even if he were

²³ McCarten noted that he left the Gittings interview once he determined that he had sufficient information to "prove our regulatory case." McCarten Interview at 68. McCarten also acknowledged that he had the opportunity to participate in the Schwiers interview but, because he felt unprepared, he declined. Id.

²⁴ We did not attempt to highlight the specific allegations made by Mr. McCarten or to point to the contrary explanations or facts developed in this inquiry. Rather, we have previously transmitted a copy of Mr. McCarten's interview, together with his letter of June 29, 1983 (Exhibit H) to the Commission for appropriate action.

to go back and find that a particular record had been falsified or modified that it would not make any difference with regard to whether or not we still had track [of] material in question..." Id. Based on this inquiry, we find that Mr. Norelius' view of IE's responsibility is reasonably consistent with those articulated by senior IE officials. See, Stello Interview at 8 and 33-37; Keppler Interview at 14. Indeed, OIA investigators themselves believed it prudent to advise Keppler of the need to address the possibility of false records in the content of IE's health and safety investigation. Gamble Re-Interview at 15-16.

We must conclude that IE's hesitancy to pursue all potential causes, criminal or otherwise, for the altered QA/QC documents it had identified contributed to the public perception of impropriety and inadequacy with respect to the NRC's response to Zimmer. In our view, an identification of QA/QC deficiencies is but the first step in ensuring compliance with the Commission's regulatory requirements. The necessary second step is a full exploration of the potential causes of such deficiencies. To do the former but not the latter is, in our view, akin to treating only the symptoms of a cancer. In our mind, the results in each case will be the same -- a longer period of illness ending in the death of the patient.

"(3) IE and Applegate established ground rules for conducting IE's second investigation, such as interviewing all witnesses under oath, but these ground rules were not followed, and OIA in its review function and in its cooperation with IE should have seen that they were."

The basis for this allegation was a meeting held in Region III, where ground rules were allegedly set for the region's health and safety investigation.²⁵ Attachment 1 of Exhibit B at 2-3. According to GAP/Applegate, the ground rules were not followed during Region III investigation, and they were surprised that OIA did not oversee the investigation to ensure that the ground rules were followed. They concluded that OIA was probably acting in consort with IE and had agreed not to follow the previously agreed to ground rules. As reflected in the transcript prepared from a tape of the meeting and further explained by Devine, the rules IE had agreed to and which OIA had either agreed to or given silent consent to were: (1) all interviews were to be taken in sworn affidavits; (2) all sworn affidavits were to be included in Region III's final report; (3) weekly reports on the progress of the investigation were to be given to Applegate; and (4) if there were discrepancies between information given by Applegate and that given by sources

²⁵ The interview summary prepared by Malsch and Levi stated that contributions to this allegation came from both Devine as leader, Bernabei and Applegate.

he named, the NRC was to conduct a joint interview of Applegate and the source. Applegate stated that all interviews were not taken in sworn statements or included in Region III's report; the weekly briefings stopped in mid 1981 and no joint interviews were conducted although there were major discrepancies between Applegate's information and what the sources told the NRC.

A review of the transcript of the February 26, 1981 meeting confirms that there was a discussion with Devine and Applegate about ground rules for Region III's second investigation.²⁶ Document 28a at 88. At the meeting, Devine acknowledged that "Before we all came together as a group I appreciated your observation, Mr. Keppler, about the need to be taking statements under oath particularly with utility executives such as Mr. Marshall and others that we have criticized in their disclosure for unsworn statements in the investigation." Id. at 88. Investigator McCarten did take all sworn statements. Id. at 89. There were, however, interviews conducted where statements were not taken. Whether a statement was to be sworn or unsworn was determined by McCarten to be whether it was part of a significant interview. Id. at 89-90. If it related to the GAP allegations, it was considered significant. Keppler has acknowledged that there was at least a discussion of sworn statements, and the possibility of "Devine and a few others possibly" attending interviews where Region III investigators "were getting a different story than Mr. Applegate's sources or Mr. Devine's sources were [sic] given." Keppler states that at least the last was "dodged to some degree." He further noted that it was an unusual method later disapproved by Victor Stello. Keppler was instructed by memorandum from his management not to "go this way." Keppler Interview at 59-62.

There was an agreement by Keppler early in the February 26, 1981 meeting that there would be "some kind of periodic contact" made with Applegate for the purpose of Region III obtaining "any additional information." Document 28a at 3. Consistent with this approach,

²⁶ Present for the NRC were the following persons:

James G. Keppler, Director, Region III
A. Bert Davis, Deputy Director, Region III
John Streeter, Acting Director, Enforcement and
Investigation Staff, Region III
Robert Warnick, Chief, Reactor Projects Section 2B,
Region III
Ted Gilbert, Investigator, IE Headquarters
Arthur Schnebelen, Investigator, Office of Inspector
and Auditor
James McCarten, Investigator, Region III
Paul Barrett, Inspector, Region III

McCarten confirmed that he did speak with Applegate several times after the February 26 meeting. McCarten Interview at 13.

Devine confirmed that the four ground rules listed in the Malsch memo, Attachment 1, page 3, were covered in that February 26 meeting. He mentioned that interviews were to be "formalized and the individuals would swear to their accuracy." Devine Interview at 12. "Weekly progress reports were to be made to Applegate to see if he had any new information to add because he and GAP continued to work on the case during the NRC's probe." Id. at 12-13. McCarten agreed that four promises were made at the February 26, 1981 meeting. McCarten Interview at 40. However, McCarten notes that there was no understanding that OIA was to monitor Region III investigation because OIA was in the region on Phillip's case. Id. at 41.

At the February 26, 1981 meeting the OIA representative, Mr. Schnebelen, was introduced early in the meeting as one who was conducting an investigation of Region III's earlier investigation. Schnebelen's February 26 participation was limited to an explanation of DOJ's relationship to NRC. Document 28a at 117-122. Moreover, the commitments made to Applegate concerned his 19 Applegate allegation -- not to the whole Zimmer investigation. McCarten Interview at 40. Devine stated that Keppler, after the February 26 meeting (not part of the transcript), made a commitment to Devine which he shared with Applegate that if "there were any contradictions between the information supplied by GAP from witnesses and on the information that the NRC obtained from those same witnesses that we could have joint interviews to resolve the contradictions, so that the second time around the NRC report would be the final solution, the final word on this rather than on getting another round of controversy after ..." Devine Interview at 13-14. Devine further informed us that it was not Applegate but Devine as Applegate's counsel who would participate with the NRC investigators. Id. at 14. Periodic reports were given to Applegate by McCarten, but by April 1981, they had stopped Devine Interview at 13 and 16; McCarten Telephone Interview; McCarten Interview at 113.

Evidence compiled by us substantiates the fact that commitments were made to Devine and Applegate in a meeting at Region III on February 26, 1981. There was, however, no mutual understanding by the NRC personnel or GAP/Applegate of these ground rules or commitments, or how, as a practical matter, they would be implemented. For example, NRC personnel used the term "contact" with Applegate to mean telephone call to see if Applegate had any new information. It is the GAP/Applegate position that the contacts were to be weekly reports on the progress of Region III's investigation; thus making Applegate more of a participant in the Region's investigation. However, as noted above, contacts with Applegate were stopped in April 1981 when the investigation of his particular allegations ended. McCarten Interview at 113.

With respect to the interviews that Region III would conduct in the second investigation, there is again a different emphasis on whether

they all should or would be sworn interviews. At the February 26 meeting with both Applegate and Devine present, McCarten pointed out that only in significant interviews would the interviewee be sworn. Document 282 at p. 89-90. By silence, we have concluded that Applegate and Devine had found this limitation acceptable. The GAP/Applegate requirement contained in this allegation that "all sworn affidavits were to be included in Region III's final report" appears to be primarily a difference in the agency's and GAP's perception of good investigative techniques. GAP puts more confidence in sworn statements while the agency takes both sworn and unsworn statements. In our view, there is no magic attributable to either and we found no applicable statutory or regulatory provision requiring sworn statements.

Moreover, GAP and Applegate appear to draw the conclusion that by not taking sworn statements, the report is in some way defective. Yet, two interviews in which they place confidence (Schwiers and Getting) were OIA statements not under oath. See pages 10-13, supra. In addition, McCarten, who had stated at the February 26 meeting that he took sworn statements in Region III's investigation, was no longer as active during the latter part of 1981, and Jim Foster was assigned as the lead investigator and principal editor of the Region III report. Foster had not been present at the February 26 meeting, and although some sworn statements do not appear to have been taken, there is no justifiable conclusion to be drawn that the report is defective by their absence.

Consistent with this allegation, the record establishes that all interviews were not taken in sworn affidavits, that weekly progress reports did stop in mid-1981; and that joint interviews were not conducted where there were major discrepancies between Applegate's information and the NRC's investigative findings. However, no wrong doing associated with these features was discovered and the failures did not, in our view, affect Region's III investigation. As to joint interviews, Keppler was prevented from conducting joint interviews by his own management. Keppler Interview at 62. Notwithstanding this, it is difficult to understand why Keppler, having by February 26, 1981 knowledge that the Applegate affair had become a cause celebre, would have permitted himself to be drawn into commitments which could potentially hamstring IE's then pending investigation. If the comments were an attempt to placate Applegate, they did not serve their purpose and the public was afforded an opportunity to draw unfavorable perceptions about an agency investigation. In retrospect, we find that if these four commitments were important enough to have been made at the February 26 meeting, then they should have been honored or those persons to whom the commitments were made should have been given an explanation as to why the agreement(s) would not be kept. The failure to do either reflects, in our view, poor judgment and contributed to the instant controversy.

27 But see note 24, supra.

"(4) OIA improperly suspended its investigation of wrongdoing at Zimmer and requested the U.S. Attorney to halt his criminal investigation because of a concern that the IE safety investigation would be impeded even though IE had in fact stopped its active investigation to continue its practices and to cover its tracks. However, there were no allegations that OIA withheld information from the U.S. Attorney's office."

Applegate alleged that around April 1981, OIA's parallel criminal investigation at Zimmer was terminated because of a "heavy-handed deference by OIA to IE so as not to interfere in the IE investigation." Attachment 1 of Exhibit B at 6. For similar reasons, OIA allegedly requested the U.S. Attorney's office to stay its criminal investigation. Yet, according to Applegate, there was no active IE investigation that could have been hindered since the IE investigation at Zimmer "was dormant from July, 1981 to April, 1982...."²⁸ Id. During this period of inactivity, Applegate noted that the targets of the criminal investigation continued to run Zimmer's QA programs. From this, Applegate concluded that OIA must have known it was allowing the targets to cover their tracks and thereby permitted the situation to get out of hand. Applegate further alleged that on August 1, 1980, he advised representatives from the U.S. Attorney's office and Region III that criminal conduct was on-going even as Region III was conducting its investigation. According to Applegate, the U.S. Attorney's office indicated that it was prepared to initiate a criminal inquiry if the NRC determined that there were potential criminal violations. Notwithstanding this commitment by the U.S. Attorney's office, Applegate asserted that OIA was lax in not looking into his criminal allegations or in not promptly referring the matter to the Department of Justice. While acknowledging the absence of specific evidence regarding Cummings' role, Devine maintained that "he could not believe the investigators were responsible for the situation because they were professionals." Id. at 7. Applegate added that a confidential source told him that Cummings had a direct role and, given the structure of OIA, Cummings was responsible for what OIA did. None of the allegers, however, expressed any concern that information was withheld from the U.S. Attorney's office.

²⁸ Indeed, Applegate alleged that McCarten had told him that OIA was investigating whether CG&E directed OIA records at Zimmer to be falsified and that records falsification was outside the scope of the IE investigation. Attachment 1 of Exhibit B at 6.

²⁹ McCarten did allege that significant information was withheld from the U.S. Attorney's office. McCarten Interview at 90 and 161-63. When he left the employ of the NRC in 1982, McCarten provided Region III officials with a copy of everything in his files pertaining to Zimmer. Id. at 90; Document 108. When McCarten was subsequently interviewed by the FBI as part of the U.S. Attorney's

While some questions can be raised concerning OIA's implementation of its liaison responsibility with the Department of Justice³⁰ and

current criminal inquiry, he also provided the agent with the documents in his files. McCarten Interview at 91. The FBI, according to McCarten, expressed concern that this information had not been previously provided to the U.S. Attorney's office. Id. at 92. The Assistant U.S. Attorney in charge of the inquiry reported that this matter was indeed raised. Tracey Interview at 44-46. However, she stated that the agent was confused about what documents had previously been provided by the NRC and that the U.S. Attorney had never requested the NRC to provide it with all documents pertaining to Zimmer. Id.

30 For example, in June 1981, OIA investigators in the field determined that there "was a strong indication that [the apparent subversion of the QA program at Zimmer] may have been orchestrated by senior management of either Kaiser Engineering [or] Cincinnati Gas and Electric...." Gamble Re-Interview at 7. Because of this, they recommended an immediate referral of the matter to the U.S. Attorney's office. Id. However, Cummings rejected the recommendation in favor of a more traditional, OIA-conducted criminal investigation and went on-site at Zimmer to ensure, according to Gamble, that no contact with the U.S. Attorney's office was made. Id. at 8-10 and 18-20. See also, McCarten Interview at 59-60 and 62. OIA never made a formal referral to the Department of Justice. Sinclair Re-Interview at 18-19. When the issue was raised by the U.S. Attorney's office (Document 104), Cummings was reported to first question the absence of a referral and then assert that "there's referrals and then there's referrals." Id. at 20. While a legitimate question can be raised whether a formal referral to Justice was necessary or appropriate at the time, Cummings' reported response, in our view, evidences the overly informal relationship between the U.S. Attorney's office and OIA that contributed to the instant controversy. Finally, OIA apparently committed to provide the U.S. Attorney's office with an analysis of the potential criminal violations at Zimmer. Tracey Interview at 38. That analysis, however, has yet to be provided. Id. 49-51. These omissions clearly affected the credibility of the NRC in dealing with the Department of Justice. Indeed, the Assistant U.S. Attorney in charge of the Zimmer probe stated that "OIA was suppose to be the liaison with us and we weren't getting anywhere ... so we were always kind of waiting and twiddling our thumbs till we finally figured out that we could not rely on OIA before we took some action." Id. at 51. However, the situation apparently improved with the creation of the Office of Investigations. Id. at 48-49.

IE's sensitivity to potential criminal violations,³¹ the record refutes Applegate's allegation that OIA caused its criminal investigation and that of the U.S. Attorney's office to be improperly suspended in deference to the IE health and safety investigation. OIA's inquiry into possible criminal falsifications of records at Zimmer began to take shape early in 1981, with a formal file created in May of 1981.³² This criminal inquiry, however, was based on information independently developed by Region III, and not on the Applegate/GAP allegations. McCarten Interview at 6-16. Regular contacts with the local U.S. Attorney's office in Cincinnati also began in March 1981. Tracey Interview at 5. The record clearly documents a pattern of formal and informal exchanges of information between Region III or OIA and the Department of Justice. See e.g., Documents 49, 54, 63, 70-73, 75, 79, 83, 101, 104, 105, 107, 115, 116, 118, and 120. However, as early as April 22, 1981, representatives of the U.S. Attorney's office voiced concerns about a potential "parallel proceeding" problem given the proposed continuous exchange of information between Justice and the NRC and the existence of an active criminal file. Document 49 at 2-3. Following an exchange of correspondence and several conference telephone calls between main Justice, the U.S. Attorney's office, and OIA, it was OIA's understanding that it could continue with its parallel criminal probe. Gamble Re-Interview at 27-28; Document 83. However, the concern regarding parallel proceedings apparently re-surfaced in September 1981 when the U.S. Attorney's office determined that both practical and tactical reasons required either the civil investigation or the criminal investigation to be held in abeyance. Gamble Re-Interview at 28. According to Gamble, Patrick Handley of the U.S. Attorney's office was initially of the view that the IE health and safety investigation should be stayed. However, following Gamble's explanation of the Commission's policy disfavoring any hindrance of its inspection and enforcement program and Region III's commitment that its investigation would be completed by December 1981, Handley agreed that the reasonable approach would be to hold the criminal investigations by the U.S. Attorney's office and OIA in abeyance pending the completion of Region III's health and safety investigations. *Id.* at 28-32; Tracey Interview at 20-22; McCarten Interview at 29-31; Document 79. Moreover, all the principal participants agree that the decision to stay the criminal investigations was that of the U.S. Attorney's office and that OIA or Cummings did not in any way suggest such action. Tracey Interview at 22-24; Sinclair Re-Interview at 13-14; Gamble Re-Interview at 29. Indeed, the Assistant U.S. Attorney in charge of the Zimmer investigation recalls that Cummings

³¹ See pages 13-14, *supra*.

³² The criminal investigation file was officially numbered 81-39. Prior to May, information related to criminal violations was maintained in file 81-18, the record of OIA's investigation of the adequacy of IE Report No. 50-358/80-09.

called her to complain about the decision. Tracey Interview at 24-26; Document 83.

Finally, the record also establishes that representatives from Region III consistently advised both OIA and the U.S. Attorney's office that an active investigation at Zimmer was on-going. See, e.g., Tracey Interview at 14-15, 31, and 33; Sinclair Re-Interview at 12-13 and 26-27; Thompson Interview at 30; Gamble Re-Interview at 31; and Document 63. Accordingly, if the Zimmer investigation was, as Applegate alleged, dormant between July 1981 and April 1982, OIA cannot be reasonably charged with knowledge of such inactivity.

"(5) IE diverted resources to investigate Applegate (Applegate stated that he had a personal feeling that OIA might have had an influence here but that he had no support for this feeling)."

Applegate alleged that Region III investigators were pulled from their health and safety investigation at Zimmer to determine whether he had been in a mental institution or whether he was a sexual deviate. Attachment 1 of Exhibit B at 5. Applegate stated that McCarten told him that the reason McCarten would no longer give him weekly briefings was because Applegate was to be investigated. Applegate further alleged that his former employer, his landlady, and members of his family had been interviewed about Applegate.

The record in this matter is devoid of any evidence, documentary or otherwise, supporting this allegation. None of the witnesses interviewed by us knew of an investigation of Applegate initiated by the NRC at any level. See e.g., McCarten Interview at 113; Keppler Interview at 26; Cummings Interview at 145; Stello Interview at 65. But see Davis Interview at 4-9 where he recalls that some adverse information regarding Applegate was received unsolicited by Region III. While McCarten acknowledges that he stopped briefing Applegate around April 1981, he disputes that the briefings stopped because of any investigation of Applegate or that he advised Applegate that he was the object of any investigation. McCarten Interview at 113. "The periodic briefings of Applegate were ended when we stopped investigating his allegations and we told him that." Id.

On June 1, 1983, we conducted a short telephone interview with Mrs. Larry V. Means in Covington, Ky. Mrs. Means acknowledged that she knew Thomas Applegate and that he was renting a room from her in April 1981. She stated, however, that Applegate had left in August 1981. She denied that she had been interviewed by NRC agents concerning Applegate but did advise that Tom Devine from GAP had asked her some questions about Applegate. On June 20, 1983, we attempted to contact by telephone Applegate's former employer, Major W. Cox of Confidential Services, Inc., in Cincinnati, but were unable to locate a telephone listing for him in Ohio.

In our view, this allegation fails for lack of any collaborating information. We must conclude that Applegate's "personal feeling" was merely that; a manifestation of one who felt rebuffed.

"(6)The OIA report was improperly edited to delete critical information regarding CG&E management involvement and possibly also to delete comments that were critical of IE."

As detailed in their November 4, 1982 interview, Applegate and his attorneys alleged that the OIA report was "censored" in two respects:³³

1. An interview with Terry Harpster was deleted from the final report; and
2. A critical discussion of I&E procedures and investigations may have been deleted from the report.

Attachment 1 to Exhibit B at 7-8.

Devine and Applegate state that the Harpster interview was essential to the OIA report because it corroborated Applegate allegations which Region III had previously found to be unsubstantiated. See generally, Document 6. Moreover, they believed it was an important interview because it cast doubt on CG&E's alleged ignorance of quality assurance problems.³⁴ Devine further speculated that a section on investigation procedures may have been deleted from the report. As the basis for this speculation, he noted that Attachment 10 to the OIA report is a chapter from I&E's Inspectors' Manual, yet there is no discussion in the text of the report addressing that subject. He suggested that a possible motive for deletion may have been to avoid criticism from I&E that OIA did not understand the I&E procedures.³⁵

In a memorandum prepared in April, 1983, Mr. Cummings responded that any editing of information from the first draft of OIA's report was

³³ At page 7 of the summary, Applegate is attributed with alleging that the "November" 1981 OIA report was censored. Given the context within which this statement was made, it is assumed for the purposes of this investigation that Applegate's reference is to the OIA Report of August 7, 1981.

³⁴ See pages 10-11, supra, and Stello Interview at 24-26.

³⁵ John Sinclair and David Gamble, two OIA investigators who had worked on the Zimmer report, were suggested as sources for details of this "censoring."

done in furtherance of fashioning a precise report that addressed all the relevant issues within the scope of their assigned investigation from Commissioner Ahearne. Exhibit G at 3-4, also listed as Document 146. Moreover, he stressed that OIA's finding that Region III's investigation was "unsatisfactory" is language that could hardly be characterized as placing either the NRC or I&E in a favorable light. Id. at 4.

In the course of our investigation, other concerns regarding the editing of the OIA report were brought to our attention. We have chosen to address these concerns as well as those in the interview summary in order to make this report as complete as possible. While the discussion below certainly does not encompass all the editing that occurred, it does address those areas where serious concerns were expressed. These areas were:

1. The editing of the OIA report to reflect the scope of the investigation;
2. The deletion of the Terry Harpster interview;
3. The deletion (or non-inclusion) of an analysis of the I&E Inspectors' Manual; and
4. The editing of the final draft of the OIA report after its review by Region III.

1. The Editing of the OIA Report to Reflect the Scope of the Investigation

Mr. Cummings states that all editing and/or deleting was done with a view towards fashioning a precise report within the "scope" of the investigation assigned to OIA by Commissioner Ahearne. Exhibit G at 3-4. Therefore, any attempt to evaluate the propriety of the editing of the report in general as well as with respect to the specific deletions involves a determination of the scope of the OIA investigation. We found a polarization of opinion on this basic issue between Mr. Cummings and Mr. Schnebelen on the one hand and Mr. Gamble, Mr. Sinclair, and Mr. Fortuna on the other. These individuals originally "scoped" the OIA investigation in January, 1981 in response to Commissioner Ahearne's request to OIA to conduct the investigation. See Document 8.

At that time, Mr. Fortuna was the Assistant Director of OIA and Mr. Schnebelen, who had previously been Chief Administrator of Audits, was Special Assistant to the Director. During the January-March 1981 time-frame, Mr. Fortuna was gradually disengaging himself from projects at OIA because he was scheduled to be detailed to the Pennsylvania Human Relations Commission in March, 1981. Mr. Schnebelen became Acting Director for Investigations after Mr. Fortuna left.

In essence, Mr. Cummings and Mr. Schnebelen expressed the opinion that the scope of the OIA investigation was limited to an examination of the adequacy of Region III's investigation of the Applegate allegations; i.e., a determination of whether that particular investigation was adequate or inadequate, and if inadequate, in what ways it was inadequate. Mr. Gamble, Mr. Sinclair, and Mr. Fortuna, on the other hand, expressed the opinion that the scope of the OIA investigation was a broader undertaking, i.e., an examination of that particular investigation in the context of the policies and procedures of Region III - to determine what caused the inadequacies and to determine whether there were generic program weaknesses that should be uncovered and corrected. All agreed that the focus of the investigation was not to be on particular investigators, but rather to be on Region III.

An investigation scoped in either way could be considered responsive to Commissioner Ahearne's request. In light of all the information in our record, we conclude that in all likelihood the original scope was that described by Mr. Gamble, Mr. Fortuna, and Mr. Sinclair and that the scope of the report was narrowed at a later time by Mr. Cummings.

Mr. Gamble, Mr. Sinclair, and Mr. Fortuna took the lead in originally framing the scope of the investigation. In light of their past experiences with poor investigations in Region III as well as in other regions, they determined that an investigation that merely disclosed the adequacy or inadequacy of a particular investigation would be of little value. See, e.g., Sinclair Interview at 80. Therefore, they decided that if they discovered inadequacies in the Applegate investigation they should examine Region III's program and procedures for possible underlying reasons and for possible generic problems. In their eyes, the investigation involved two stages: first, determining the adequacy of the investigation, and second, determining whether the reason for its failure was a "people problem" or an "investigative program problem." Id. at 42.

They presented their suggestion to Mr. Cummings at a meeting in January 1981. Mr. Cummings, Mr. Schnebelen, Mr. Sinclair, Mr. Gamble, and Mr. Fortuna participated in that meeting. At that time, Mr. Cummings was receptive to their view and approved the more broadly scoped investigation. Cummings Interview at 72-73.

On January 13, 1981, when Mr. Gamble, Mr. Sinclair, and Mr. Fortuna went to Region III and informed them of OIA's investigation, they stressed that the focus of their investigation was not the particular investigators, but rather Region III's investigation of the Applegate allegations in the context of the procedures and programs under which Region III was operating. They assured the Region that their investigation was not going to be an employee misconduct case because Mr. Phillip's report was one of the better I&E reports that they had reviewed. Sinclair Interview at 82.

During March 1981 through August 1981, Mr. Cummings' editing of the report did result in a report that was narrower in scope than that originally decided upon in the January scoping meetings. Mr. Cummings explains that he limited the scope of the report to reflect only Region III's particular investigation of the Applegate allegations because he was not satisfied that OIA had unearthed sufficient evidence to "condemn" the entire investigative program. Cummings' Interview at 42. Mr. Cummings apparently also changed his mind between January and July 1981 about what the scope of the investigation should be. He came to the view that if there was going to be a "generic lynching," that not only would more work be required, but also that all the regions should be investigated, not just Region III. Id. at 72-73. See also, Document 67.

We agree with the views expressed by Mr. Sinclair, Mr. Gamble, and Mr. Fortuna that a report that exposed the deficiencies in Region III's program and explained why the inadequacies occurred in the Applegate investigation would have been a more valuable report than the one OIA issued, outlining only in conclusory form the inadequacies of that particular investigation. We believe that such a report, particularly the summary, could have and should have revealed the reasons for the failure of the investigation. While some may indeed have viewed such a report as a condemnation of the entire IE investigation program, we believe the Commission was little served by the artificially limited conclusions of OIA's August report. Indeed, in avoiding the possible causes of Region III's unsatisfactory 1980 investigation, OIA committed one of the very errors it charged to IE.

However, we have found no improper motive on Mr. Cummings' part with respect to the narrowing of the scope of the report. Mr. Cummings considered the objections of his investigatory staff and reached a different conclusion based on his assessment of what the investigation had unearthed and what the scope of this investigation should be. In deciding to limit the scope of the report to cover only those aspects that he felt had been fully investigated to his satisfaction and to leave other findings for a later and more expansive investigation, Cummings acted within the bounds of his discretion as Director of the office. Nevertheless, a more expansive investigation was never initiated by OIA. Having identified a potential systemic problem, OIA should have expeditiously scheduled a follow-up audit of IE's general inspection program. To the extent the creation of OI made such an audit unnecessary, OIA should have formally ensured that the deficiencies suspected in the prior IE system did not reproduce themselves in the new OI system.

In sum, because OIA merely found that the investigation was unsatisfactory and provided no insight into the underlying reasons for its failure, the final report did take the form of an employee misconduct case (what OIA initially said it would not do). Moreover, we find that by editing the report to fit Cummings' narrow view of the scope of OIA's report and excluding any consideration of possible generic deficiencies

in IE's inspection and investigation program, OIA lost an important opportunity to expose program weaknesses and propose constructive solutions. Once again, the public perception of impropriety was fostered by the exercise of poor judgment.

2. The Deletion of The Terry Harpster Interview

Terry Harpster was interviewed on March 6, 1981 by John Sinclair and David Gamble in response to a challenge made by Mr. Harpster to someone in I&E management that OIA would not dare interview him. Sinclair Interview at 59; Gamble Interview at 19. Mr. Harpster, a reactor preoperations specialist in I&E, was at that time on detail as a Special Investigator to the Subcommittee on Energy, Environment and Natural Resources of the Committee on Government Operations, U. S. House of Representatives. Mr. Harpster had been the principal inspector at Zimmer from 1977-1979. Mr. Cummings approved this interview as he did all the other interviews (Sinclair Interview at 60. See also, Deposition of James Cummings (March 8, 1983) taken in Applegate v. NRC, supra., at 13, 15 and 16), and may even have directed Mr. Sinclair and Mr. Gamble to conduct it. According to Mr. Gamble, William Ward, Chief of the Investigations Branch of the Investigations and Enforcement Staff at I&E Headquarters, initially suggested that OIA interview Mr. Harpster. At a later date Dudley Thompson, Director of I&E, called Mr. Cummings and recommended that they interview Mr. Harpster. Document 102; Gamble Interview at 19.

Mr. Cummings deleted the Harpster interview from the draft report in July, 1981 over Mr. Sinclair's and Mr. Gamble's objections. His view was that the interview was not relevant to whether Region III did a good job investigating the Applegate allegations. Moreover, Mr. Cummings decided that the Harpster interview more appropriately belonged in the Zimmer criminal file 81-39. Cummings Interview at 127 and 129. Mr. Schnebelen agreed with that assessment because, in his words, the Harpster interview covered a "waterfront." Schnebelen Interview at 43. However, Mr. Gamble and Mr. Sinclair found the interview relevant to evaluating Region III's performance because it showed that there were serious generic problems at Zimmer predating Region III's investigation, and yet Region III basically found no significant problems in its 1980 Applegate investigation. Sinclair Interview at 78.

We have found no evidence of an improper motive in Mr. Cummings' decision to delete the Harpster interview from the investigation report on Region III 1980 Applegate investigation or to include it in the investigation report on Zimmer (File 81-39). Nonetheless, we do find the failure to document the Harpster interview in any way in the 81-18 report questionable, particularly in light of standard investigatory practice to document whatever investigatory efforts are conducted. Sinclair Interview at 10-11. Thus, the appearance of impropriety would have evaporated had the OIA report documented the fact that the interview took place, the essence of the interview, and the report in which that interview would be addressed. We find the failure to do this

particularly troublesome because the interview contained information that appeared to be damaging to both the NRC and CG&E.³⁶ An office that is intended to be the equivalent of an Inspector General's Office should maintain practices that are beyond even the appearance of impropriety. We must conclude that Cummings' handling of the Harpster interview did not satisfy that standard.

3. The Deletion (or Non-inclusion) of an Analysis of the I&E's Inspector's Manual

In the latter part of July, 1981, John Sinclair, on his own initiative, apparently wrote a section entitled "Review of Inspector's Manual". The substance of that review concluded that Region III did not follow its own criteria for investigations in conducting its 1980 Applegate investigation. For a short period of time, that section may have been in the body of the report, but Mr. Cummings and Mr. Schnebelen jointly decided to delete the section as unnecessary. In their view, the investigation was so obviously inadequate, they did not need any analysis as to how it did not comport with acceptable investigative standards. They did, however, keep Chapter 8 of the I&E Inspector's Manual as an attachment to the OIA report. See, Document 67, List of Attachments.

The I&E Inspector's Manual, according to Mr. Phillip, is a training tool he authored for new personnel. Document 67 at 16. The apparent purpose of the manual originally was to orient new inspectors to the inspection program under I&E. Region III used the guidelines in that book, according to Mr. Phillip, because there were no established I&E investigatory procedures from Headquarters. Phillip Interview at 50. In addition to that manual, the Region also followed other guidelines generated in "other kinds of pieces of paper" either by Mr. Phillip or by Mr. Norelius, his supervisor at that time. Id. at 51.

Clearly, an entire section on these guidelines would have been necessary if the focus of the report was the adequacy of these procedures or if those guidelines were the standard that the OIA was using for its review. However, given Cummings' decision to restrict the scope of the report, we find nothing improper about the decision to delete the

³⁶ Cummings subsequently failed to transmit the Harpster interview to Region III along with other interviews from the 81-39 file. See, Document 124. Cummings explains this omission as an oversight. Cummings Interview at 126-27. While we accept his explanation, we find it difficult to believe that Cummings would have over-looked the Harpster interview after it had created such disagreements among his staff a few months before.

analysis of the I&E Inspection Manual. That decision reflects, in our view, a reasonably consistent exercise of proper managerial discretion.

4. The Editing of the Final Draft of the OIA Report After Its Review by Region III

Despite protest from both Mr. Gamble and Mr. Schnebelen, Mr. Cummings directed them to travel to Region III to review the final draft of OIA's report with the Region on August 3 and 4, just a few days prior to its issuance on August 7, 1981. Mr. Gamble objected strongly to this action and even Mr. Schnebelen expressed the view that they had never discussed draft reports with management or anyone else. Schnebelen Interview at 69. However, Mr. Cummings expressed the view that although this might be a slight deviation from accepted practice, it was more important to him to make sure that everything was accurate. He stated that he would take the criticism for the deviation. Id. Accordingly, Gamble and Schnebelen were directed to permit each individual to review his interview summary and comment upon it.

Despite this alleged direction, we found in our interviews of Region III personnel that not all interviewees were given the opportunity to review their interview summary. Apparently, non-Region III employees and Region III employees who were away from the office were never contacted. In addition, Mr. Gamble read aloud the general summary of OIA's draft report at a group meeting with Keppler and Region III officials. After that meeting, Mr. Keppler called Mr. Cummings and voiced to him his objections to parts of the report. In response, Mr. Cummings added language to the summary, including the last line of the first paragraph, which he did not find "offensive" and which seemed "to meet [Mr. Keppler's] requirements." Cummings Interview at 163. OIA also made some corrections to the individual summaries, but none that we found to be of a substantive nature. An asterisk indicates those places in the interview summary where the changes were made.

We find OIA's review of the final draft with the subjects of its investigation and its alteration of the report in response to their criticisms to be highly improper investigatory conduct. Every investigator and inspector (except Mr. Cummings) questioned indicated that the showing of a draft report to its subjects prior to its release was unusual and improper investigatory practice. Yet Mr. Cummings stated that although it was a close decision on his part and not a "normal thing to do," he does not think it was "a wrong thing to do," nor does he regret it. Cummings Interview at 174-76.

Even more disturbing is Mr. Cummings' apparent attempt to conceal the fact that this event took place at all by not documenting it. Although Mr. Cummings states that he approved everything in the report (Cummings Deposition of March 8, 1983, supra., at 54), as indicated below, he had already signed the report and had left the office prior to the insertion of the asterisks reflecting changes made as a result of a "reinterview."

Indeed, although the OIA report was signed on August 7, 1981, the report was not actually sent out to reproduction until the 10th. Mr. Sinclair added the asterisks before the report went out to reproduction with the approval of Mr. George Messenger, Deputy Assistant Director for Audits, because Mr. Cummings was out of the office at the time. Sinclair Interview at 92; Document 141, Memorandum from Sinclair to Gamble, dated August 10, 1981. Mr. Sinclair, took this action despite being advised by Schnebelen that, at Mr. Cummings' direction, there was to be no write-up of this review of the final draft with the Region and no indication that changes had been made as a result. Sinclair Interview at 84. Nonetheless, Sinclair acted because, in his mind, the failure to document their occurrence was something he could not "live with" and something he believed could have been an "absolute catastrophe." Id. at 84 and 87.

While we find none of the modifications to the OIA report to be motivated by bad faith, we must conclude that OIA's review of the final draft with Region III, its alterations of the report in response to the criticisms of Region III interviewees, and most fatally, Mr. Cummings' apparent attempt to conceal these events from the report cast a serious cloud on the integrity of OIA's office and its ability to conduct investigations in a manner beyond reproach.³⁷ Moreover, we find the asserted justification for the August 3-4 meeting with Region III (to permit interviewees to review their interview summaries) to be unbelievable given the failure to ensure that all interviewees had such an opportunity and the unexplained reading of OIA's summary. Rather, we conclude that Cummings hoped to blunt the criticism he knew the Report would cause by providing Region III with advance notice of OIA's findings. While Cummings' apparent concern was understandable, we find his decision on this point to be poor judgment in the extreme.

V. FINDINGS

1. We find no substantial evidence of a bad faith effort on the part of the Director, OIA, or that office, in carrying out their respective responsibilities in first evaluating the adequacy of Region III's 1980 investigation of Thomas Applegate's allegations and in second pursuing possible criminal violations at the Zimmer Nuclear Power Station.

³⁷ Cummings apparently continues to believe that subjects of an investigation may be permitted to review the report prior to release. On June 30, 1983, the day our report was to be complete, Cummings telephoned Judge Hoyt to determine if he could review this report in order to prepare his review and assumed that we would want to rebut his 21review. Document 147.

2. We find that Director James Cummings, from the first telephone contact with Applegate, has exercised poor judgment in (1) attempting to personally handle Applegate's allegations (2) narrowing the scope of the OIA investigation in spite of contrary professional investigators' advise to identify generic problems of investigations, (3) limiting the thrust of the OIA report during his "editorial" review to comply with the narrow scope and (4) failing to provide the Cincinnati U.S. Attorney's office with an analysis of possible criminal violations at Zimmer in a timely manner. Director Cummings' conduct, although not violating any statutory or regulatory requirement applicable to this agency, has permitted a public perception of impropriety.

3. We find that on February 26, 1981 Director of Region III, James Keppler, permitted Thomas Applegate and his attorney to appear to participate in an official government investigation and to establish ground rules for conduct of an official agency investigation. We further find that Director Keppler listed Thomas Applegate and Louis Clark, Director of GAP Institute for Policy Studies, as official carbon copy recipients of the Notice of Violation and Proposed Imposition of Civil Penalties addressed to Cincinnati Gas and Electric Company with copies of Region III's report of an investigation conducted during period January 12 to October 9, 1981 and transmitted directly to them a contemporaneous copy of the report. Both these actions, while not improper in and of themselves, gave the impression that Applegate and GAP had a formal role in the initiation and conduct of an official NRC investigation. We find these actions to border on an abdication of management control and to constitute poor judgment by a senior NRC official.

4. We find that Victor Stello, while Director of IE in 1981 and as Deputy Executive Director for Regional Operations today, has taken the official position and did so instruct Region III officials in 1981 that IE personnel are not to conduct criminal investigations. While facially correct, we further find that Region III officials apparently relied upon Mr. Stello's leadership on this aspect of enforcement to justify a failure to vigorously pursue all possible causes or types of regulatory violations. As a consequence of this hesitancy to address potentially criminal conduct, we find that Region III officials initially narrowed the scope and depth of their investigation into altered or incorrect QA/QC documents at Zimmer to the detriment of the NRC's enforcement program.

5. We find component offices of this agency operating within unnecessarily restrictive interpretations of "health and safety" without regard to the effect such an interpretation has on the total agency regulatory mission. Moreover, IE and OIA appear to have adopted an inflexibly bifurcated, civil/criminal approach to identifying and correcting violations of NRC requirements; this division makes a total investigative analysis of the causes of regulatory violations difficult, if not impossible, to coordinate and implement. This division also induces IE to merely identify and track construction deficiencies to the

exclusion of any in-depth analyses of the potential causes of those deficiencies.

6. We find the absence of a central system for receiving, developing, and monitoring the NRC's handling of "whistleblower" complaints contributes to the public misunderstanding of the agency's commitment to public health and safety and risks the potential delay or loss to the NRC of significant safety information.

RECOMMENDATIONS

1. Establishment of an independent statutory Inspector General's office should be seriously considered as a possible solution to continuing negative public perception of this agency's ability to investigate violations of its own regulations identified by persons within or outside the agency.

2. A Hotline and Tracing System for Whistleblowers and Their Information Should Be Established. A central toll-free telephone line and computerized tracking system for receiving, recording, and tracking allegations made to the agency by persons outside the agency should be established as a way to ensure that such allegations are properly and efficiently handled. Such a Hotline service should have the capability to operate around the clock and on a nation-wide basis. To the extent OI and the regions now have such a system, they should be reviewed to ensure that none of the communication and tracking problems encountered in the instant controversy are repeated.

3. Inspectors and Investigators Should, to the Extent Practical, Be Cross-Trained. Inspectors now take an engineering approach to identify and correct regulatory violations; pursuing them only so far as necessary to cure the immediate hardware or paper problem with apparent little concern that the causes may be the result of a criminal act or a systemic breakdown in the licensee's program. While the engineering approach is a significant aspect of the NRC's licensing function, inspectors must be continually aware of the NRC's regulatory and enforcement responsibility and the type of evidentiary record necessary to support appropriate enforcement action. Since construction or operational deficiencies do violence to both the safety of a plant and the integrity of the NRC's regulatory program, inspectors and investigators should be cross-trained in both the technical and investigative fields to ensure that they can and will address both aspects.

4. The Commission Must Take the Lead in Ensuring that Regulatory Violations Are Investigated in a Coordinated Manner and in Sufficient Depth to Permit Appropriate Enforcement Action, Including, Where Appropriate, Criminal Prosecution. We believe that the existing segmented investigation program of the Commission can, if effectively coordinated, result in an in-depth analysis and vigorous enforcement of regulatory violations. However, the oft-heard excuse of "not in my charter/job description" and "not on my watch" should be recognized as poor excuses

which neither serve the agency's good name nor advance the public's perception of the agency's commitment and ability to carry out its statutory mission. The identification and enforcement of regulatory violations including possible criminal violations is in everyone's job description. Accordingly, there should be a review of office charters, job descriptions and internal operations memoranda to determine whether senior Commission officials are, by narrow interpretations of their responsibilities, effectively jeopardizing the mission of the agency.

5. Component NRC Offices Responsible for Inspections and Investigations at any Level Must Be Made Aware of the Need to Integrate and Coordinate Inspections and Investigations so that the Final Product Will Support both a Full Determination of all Health and Safety Issues and Vigorous Enforcement of Regulatory Violations, Including, where Necessary, Prosecutions for Criminal Violations.

6. Appropriate Personnel Action and/or Counseling for the Following:

A. James Cummings, as the senior official in OIA, failed to exercise the high degree of judgment which should be required of a senior Commission official. We recognize that James Cummings had no monitoring function over an IE investigation, but, as a quasi-Inspector General, he was derelict in his duty to keep OIA alert to the status of a sensitive investigation with known health, safety and criminal consequences.

B. Victor Stello, by excluding criminal matters from the responsibility of IE and by focusing primarily on "hardware" problems, has contributed to the artificially narrow concern exhibited by some Region III officials with respect to possible problems at Zimmer. While Mr. Stello has in the past pressed for a clarification of the investigative responsibilities of IE, his oft-articulated view of IE's mission has unintentionally permitted regional officials to exclude investigations into the causes of regulatory violations under the guise of "not in my job description. Moreover, he exhibited a disturbing willingness to view "paper problems" as a lesser form of regulatory violations than other types of deficiencies.

C. James Keppler, by permitting, an alleged and/or his attorney to appear to participate in any manner in an official agency investigation, jeopardized the agency's mission and contributed to the appearance of impropriety in this case. NRC investigations must be free from any possible allegation of improper influence by any non-NRC group or individual. Accordingly, respect for alleged and their allegations cannot include participation in official government investigations. Such participation could make the agency liable for an act or an omission by such non-NRC employees or otherwise give the appearance of official governmental status and/or preferential treatment of particular groups.