



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

September 8, 1983

MEMORANDUM FOR: Chairman Palladino

FROM: James J. Cummings, Director
Office of Inspector and Auditor

SUBJECT: REPORT TO THE CHAIRMAN ON ALLEGATIONS OF THOMAS APPLIGATE
CONCERNING CONDUCT OF THE OFFICE OF INSPECTOR AND AUDITOR

I have reviewed the Hoyt/Aloot report submitted to the Commission concerning their inquiry into allegations made by Messrs. Applegate and Devine and Ms. Bernabei about myself and NRC's Office of Inspector and Auditor (OIA). Because of the time constraint placed upon me, I have not been able to conduct a detailed examination or review of the majority of the report's reference documents. Accordingly, I have limited my comments/observations to the major charges made by Hoyt/Aloot relative to myself and OIA.

One of the Hoyt/Aloot final conclusions is that:

"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."

I find this conclusion to be both unsupportable and contradictory, to wit:

- ° To compare NRC's Office of Inspector and Auditor to an independent statutory Inspector General operation is totally unrealistic. OIA is a Commission level office with 12 staff auditors and 5 staff investigators who render audit and internal investigative services to the Commission. OIA is neither an independent statutory Inspector General nor a quasi Inspector General;
- ° In fact, there is no NRC standard, regulation or directive which holds OIA accountable for the real time surveillance of IE activities, including investigations and/or inspections, and Hoyt/Aloot recognize this earlier in their report;
- ° OIA is primarily an oversight office which reviews and/or reacts after the fact and is clearly not responsible for the line management of staff operations;
- ° Finally, I find it incredible that, in trying to fix responsibility for who may have been derelict in their duty to keep alert regarding the status of Region III's investigation at Zimmer, the Hoyt/Aloot report

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fails to list any of the line management entities to whom Region III reports. Neither the Regional Administrator, the Director IE, the EDO, the Chairman, nor the Commission is listed as possibly having responsibility in this regard.

From an overall perspective I find this final Hoyt/Aloot conclusion to be totally and utterly unsubstantiated in their report. It is a reckless and careless conclusion.

The following comments address some of the major Hoyt/Aloot findings dealing with OIA:

1. Director Cummings exercised poor judgment in attempting to personally handle Applegate's allegations;
 - ° Past chairmen, particularly Chairman Ahearne, have made it abundantly clear to me that they expected the Director, OIA, to become personally involved in the management and direction of major investigations and audits. I plan to continue my personal involvement in cases which I judge to be high profile and/or sensitive. To assert that I exercised poor judgment because I personally handled a telephone call to me is simply ridiculous.
 - ° The Hoyt/Aloot report also insinuates that Applegate's first phone call should have been recognized by me as very important and that, because I failed to assign any special significance to Applegate's first phone call, I exercised poor judgment in not delegating a staff member to backstop me if Applegate called while I was out of the office. As I told Judge Hoyt in the following excerpt from my testimony, there was nothing about Applegate's first phone call to me which convinced me that his allegations were anything out of the ordinary.

Judge Hoyt

It really was then because Applegate didn't come back to you with those documents that you asked him for - the documentation that you wanted - is the reason that he called the Chairman's office.

Cummings

No. What I'm arguing with you about - and I feel quite strongly about it - is there was nothing in Applegate's allegations - in that conversation or conversations - that lit a fire in my belly that says this is very serious. I'll give you another example, when someone called up from ELD and said we've got a case that indicates that operators are cheating on the TMI examination in operator licensing - that lights a fire in my belly because now I have a professor of nuclear engineering from Georgia Tech University saying I have looked at these answers and they're the same. Now when I get that kind of an allegation; from that kind of a person; in that kind of a

situation; I can guarantee you that my reaction is different than a phone call that says: I'm locked in my house; I'm afraid to go out; I have this report; I won't talk to the Region; I've been to the FBI; and we (NRC) talk to the FBI and they say we're (FBI) not going to do anything about it - they are different, different situations and I see no need for my office to have reacted differently.

That's a long speech, isn't it?

Aloot

Do I understand you right then that in making a determination of what you should do - its the source of the information - not the information itself?

Cummings

It's both. It's a judgment ...

Finally, in this regard, I would direct your attention to my memoranda of August 6, 1981, and April 15, 1983 (see Attachment A and B) wherein I previously responded to Mr. Applegate's charges on this issue. My action in regard to Mr. Applegate was both proper and responsive.

2. Director Cummings exercised poor judgment in (a) narrowing the scope of OIA investigation in spite of contrary professional investigator's advice to identify generic problems of investigations, and (b) limiting the thrust of the OIA report during "editorial" review to comply with the narrow scope.

- ° My decision to limit the scope of OIA's investigative report to the adequacy of Region III's report rather than the adequacy of IE's investigative program and whether or not I fulfilled my commitment to evaluate IE's investigative program must be considered in the context of everything that happened in that time period.

Clearly, OIA had been getting indications that there were problems in IE's investigative program based on the investigations of Automation Industries, Stepan Chemicals and Zimmer/Applegate. As I stated in my testimony to Hoyt/Aloot, however, I was not convinced at the time we completed the Zimmer investigation that the entire IE investigative program was bad. As a result, I committed to a future review of that program. On October 3, 1981, two months after OIA's report on Zimmer and before OIA could initiate its review of IE's investigative program, the EDO submitted Commission paper SECY 81-588, subject, "Investigative Jurisdiction of the Office of Inspection and Enforcement," to the Commission. That paper proposed a major restructuring of investigative responsibilities between IE and OIA and became the focal point for discussing the adequacy of NRC's investigative program.

himself/herself bad, but that the policies he or she followed were bad.

Mr. Cummings

Excuse me Sabastian, you're not listening to what I said before. What I said before was, when we wrote that investigative report we left that issue open and we said we'll come back because we're not sure that this isn't something that is generic. Now, I think that David Gamble was sure in his mind that it was generic. I think that John Sinclair probably felt that way too. The point I'm trying to make is that I was coming over that way but I wasn't ready to make a decision. Now I felt that I did not just discard that thought of theirs - in fact, if you look at our recommendations we say we'll come back and see if this is a generic problem. But what I'm saying is, the next thing that happens is we get all these cases in from IE that we're reviewing which culminates in Hayward Tyler Pump where we finally recommend and say, look Commission, we (NRC) stink at doing investigations, you're going to have to scrap the whole operation and you're going to have to form a new Office of Investigations and get with it. Now, if I make that kind of recommendation, take it away from the Regional Administrators, I really don't have to worry about what caused it to get there, we're going to scrap the whole system, set up a new office, put someone in charge who knows something about investigations and go forward - and that's what we did do. So you can't look at Applegate or Zimmer as some isolated thing - it happened (OIA's recommendation to form OI) before we even got back to the generic issue. We have Automation Industries and we have Stepan Chemical, which is an incredibly poor investigation, a hundred times worse than the Applegate/Jerry Phillip investigation - and then we have Hayward Tyler Pump. We (NRC) were talking to Mark Rowden, who was the former Chairman of the NRC, and he's getting the bloody reports changed. I mean, we're talking apples and oranges here. It's just coming in and we're saying you mean you have been over to talk to Mark Rowden, who was the former Chairman of the NRC, and he's got a copy of our (NRC's) proposed letter to his client and you've made changes to it that conform to the changes that he wants in the letter? This is how we operate? I mean it was ludicrous.

Mr. Alout

Yeah, but we want to get back to Applegate.

Mr. Cummings

I understand that, but what I'm saying is you cannot look at Applegate and talk about this generic scope - what have you - when we're sitting here and this stuff is coming in our office and we're saying, boy you thought that Applegate was bad, how about this one chief?

Judge Hoyt

Did Gamble or Sinclair have anything to do with those rather bizarre investigations?

Mr. Cummings

They weren't bizarre at all. They were hard ball, just the same way the other ones were.

Judge Hoyt

Very difficult ones lets put it that way.

Mr. Cummings

People were reasonably tense.

Mr. Aloot

Lets put, lets put it

Mr. Cummings

Yes, they did as a matter of fact. David played a very important part in Hayward Tyler Pump and an important role in Zimmer, too, I might add.

Mr. Aloot

In January 1981, the very minimum, you knew that this investigation was not a routine type of investigation for OIA.

Mr. Cummings

Yes, I did.

Judge Hoyt

Can I just inject. I want to get back to the scope business a moment. If you had all these doubts internally that you describe to us with Gamble to some extent and with Sinclair to some small extent, did you go back to the Chairman?

Mr. Cummings

Absolutely not. I get paid 65,500.00 dollars to run an office. I have more experience than either one of them and I am not going to get into a situation in my office whereby we're going to have a democratic system of deciding what the scope of the investigation is.

Judge Hoyt

That's not what, let me finish the question Mr. Cummings. The thing I want to explore, if there were these doubts on the table and I'm not proposing that this was any democratically run office, I should hope not, did you have any doubts, and apparently you didn't strong enough, that you would want some sort of a clarification of your charter from the Chairman? It never crossed your mind to ask anything like that?

Mr. Cummings

No. I did not have any doubts. No.

Judge Hoyt

That was my question. You were convinced that this was it and you so instructed your staff in terms of both Sinclair and Gamble?

Mr. Cummings

That's right. I thought that we were doing the right thing and that our scope was a correct one - correct one bearing in mind other factors and we just can't have a wish list of all the things that you want. We had to have some closure. This was not going to be an open ended investigation because if you do that what you sometimes wind up with is no product because you are now going down another trail.

In my opinion this Hoyt/Aloot finding not only fails to take into consideration the final outcome of OIA's efforts to correct a fundamental weakness in NRC's investigatory program, but also is oblivious of the day-to-day problems encountered in managing any activity. Furthermore, with regard to the question of scope, intended scope etc., I believe Hoyt/Aloot should have interviewed then Chairman Ahearne to determine what he expected from OIA in terms of scope of investigation.

Some additional comments are necessary at this point to address statements contained in this section of the Hoyt/Aloot report.

1. The last sentence in paragraph 3, page 25, states that "To the extent the creation of OI made such an audit unnecessary, OIA should have formally ensured that deficiencies suspected in the prior IE system did not reproduce themselves in the new OI system." The Commission's attention is directed to the fact that when the Commission implemented OIA's recommendation with regard to the formation of OI, it also directed that the Director, OIA, serve as a member of the Special Advisory Group to OI. In addition, OIA was directed by the Commission to a) review and comment to the Commission on the adequacy of all OI investigations until the end of FY 82 and, b) make a semiannual audit of OI program development, implementation and evaluation activities. These facts are conspicuously absent from the Hoyt/Aloot report.

2. My rationale for excluding the Terry Harpster interview from OIA's Applegate report is set forth in detail in my memoranda to OGC dated February 16, 1983, and January 5, 1983 (see Attachment C and D). Furthermore, I take exception to the conclusion that the Terry Harpster interview should have been placed in OIA's Applegate report because it contained information that appeared to be damaging to both NRC and CG&E.
3. The Hoyt/Aloot report is highly critical of my decision to review the results of OIA's investigation with Region III prior to the issuance of the report and alleges that I attempted to conceal this decision. The following facts relate to this allegation:
 - a. In fact, the report clearly identifies - by asterisk and footnote - all changes to original interviews. For example, the interview of Dwayne H. Danielson is asterisked at one point with the footnote notation "*Changes incorporated pursuant to reinterview on August 3, 1981.";
 - b. In fact, none of the changes made to individual interviews were substantive in nature;
 - c. In fact, it is not highly improper investigative conduct to reinterview witnesses/subjects of investigation nor is it highly improper investigatory conduct to review the results of prior interviews with witnesses and subjects of investigations provided that changes are documented. Such was the case in this instance;
 - d. In fact, a review of my testimony to Hoyt/Aloot discloses that at no point during the entire interview was I confronted with and/or asked to provide a rationale/explanation regarding the Hoyt/Aloot allegation that I attempted to conceal my decision to reinterview Region III personnel prior to the issuance of the report. I find this a rather bizarre way of conducting an investigation. This is particularly true in view of my sworn testimony of March 8-9, 1983, in connection with Applegate vs NRC. In this testimony I made it clear that I was sure that any changes to OIA's Applegate report would have been approved by me. At that time I further stated that although I could not prove it I believed that Mr. Messenger, my Deputy, would have checked with me before making any changes to the report. I have since discussed this matter with Mr. Messenger and have checked with NRC's Telecommunications Branch relative to long distance calls made by me in August 1981 (see Attachment E). The Commission will note that on August 10, 1981, I placed a long distance call to my office from my vacation home in Vermont. On August 10, 1981, Mr. Schnebelen was on annual leave and thus I was either returning a call made to me by Mr. Messenger or I had initiated the call to Mr. Messenger. In either event Mr. Messenger has told me that before issuing the report on August 10, 1983, he would have informed me and/or discussed with me the Sinclair change to the report.

- e. In fact, the Hoyt/Aloot investigation did not address this issue comprehensively with either myself, Mr. Schnebelen, or at all with Mr. Messenger.

This is yet another example of a reckless and careless finding.

3. Director Cummings exercised poor judgment in failing to provide the Cincinnati U.S. Attorney's office with an analysis of possible criminal violations at Zimmer in a timely manner.

- ° I cannot conclude from reviewing AUSA Tracey's testimony that the central point of her testimony was that OIA failed to provide an analysis of possible criminal violations at Zimmer in a timely manner. Ms. Tracey's testimony principally conveys her frustration in trying to deal with NRC on matters of mutual interest. It is clear from Ms. Tracey's testimony that she did not understand what IE and OIA had committed to do in assisting DOJ with regard to the Zimmer matter.

It is understandable that Ms. Tracey had a confused notion of the respective investigative responsibilities of each office, particularly since we, within the NRC, have never been able to come to grip with the problem. However, it is dismaying, to say the least, at this late date that OIA is now having to bear the burden of agency shortfalls in this area and the sad state of this agency's relationship with DOJ representatives, such as Ms. Tracey. Moreover, it is particularly dismaying since OIA made a determined effort to carefully record meetings and discussions with DOJ on the Zimmer matter. OIA files are replete with documentation which attempt to capture and report the ongoing status of the Zimmer matter and our dialogue with DOJ. Specifically, OIA and other NRC personnel met with the U.S. Attorney on April 22, 1981, September 4, 1981, May 20, 1982, and September 8, 1982, to discuss Zimmer. In addition, numerous telephone conference calls have also been documented.

In my view, the Hoyt/Aloot report misses the essential point of Ms. Tracey's testimony--NRC committed to supplying an investigative report in November/December 1981 on wrongdoing at Zimmer and after committing to this deadline, the U.S. Attorney was then advised in April 1982 that the NRC would not complete its investigative work until October 1982, nearly one year later. Your attention is directed to a letter from U.S. Attorney Barnes, dated April 21, 1982, in which he desires to reevaluate his earlier decision to delay the initiation of a criminal investigation of Zimmer because of NRC's inability to deliver its report as initially committed. This delay is important in explaining OIA's failure to identify, assess and analyze potential criminal violations. OIA absolutely required access to all NRC investigative results at Zimmer in order to perform an adequate evaluation of potential criminal violations that may have occurred at Zimmer. In addition, the two principal OIA investigators in the Zimmer matters were transferred to OI in June and October 1982 along with total investigative responsibility for Zimmer.

- ° Your attention is further directed to my September 23, 1982, memorandum to AUSA Tracey in which I documented the results of our September 8, 1982, meeting. This memorandum clearly documents the three investigative areas the NRC would address during its investigation, specifically, falsification of records, harassment and intimidation of QC inspectors, and welder qualifications. It should also be noted that the initial transmittal of information from the NRC to the U.S. Attorney, Cincinnati, did not occur until December 7, 1982. This interim report was furnished by the Office of Investigations (OI) and was for the most part only a compilation of OIA's investigative work that had been conducted in 1981. The first OI investigative report of substance was not forwarded to the U.S. Attorney until May 1983 and addressed the intimidation of QC inspectors at Zimmer - 18 months after the promised date of December 1981.
- ° I will be the first to admit that NRC failed in its liaison function to the DOJ in spite of a determined OIA effort to foster good relations and carefully keep everyone apprised of ongoing events. However, the liaison function failed, first and foremost, because the NRC failed to produce as it had committed to do. Unfortunately, as the NRC liaison official, I am looked to as being responsible for that failure. However, I have had no control over producing the product promised. Zimmer is yet another example of OIA being called to task as the responsible liaison office for operational line offices failing, in the first instance to do what they promised to do. Previous OIA reports to the Commission and line offices identifying NRC investigative shortcomings have generally gone unheeded or have been answered with counter charges. OIA has repeatedly been viewed as a meddler and obstructionist, lacking in understanding of NRC's proper investigative responsibility. Yet when these shortcomings have been exposed by others, such as U.S. Attorney's, OIA is quickly offered up as the principal culprit.
- ° In my view the Hoyt/Aloot charge that OIA failed to provide a timely analysis of potential criminal violations is another example of scapegoating of the first order. It carefully avoids addressing the question of why NRC operational personnel have been incapable of delivering as they promised or how OIA was expected to conduct an adequate review of possible criminal violations without ever being furnished the material to make a proper assessment.

Attachments:
As stated

cc: Commission(4)
W. Dircks
V. Stello
J. Keppler
G. Messenger
S. Aloot
H. Hoyt