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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

GEORGIA POWER COMPANY, et al.	*	Docket Nos. 50-424-OLA-3 50-425-OLA-3
(Vogtle Electric Generating Plant, Units 1 and 2)	*	Re: License Amendment (Transfer to Southern Nuclear)
	*	ASLBP No. 96-671-01-OLA-3

GEORGIA POWER COMPANY'S ANSWER
TO THE DECEMBER 9, 1992
AMENDED PETITION OF ALLEN L. MOSBAUGH

John Lamberski
Counsel for
Georgia Power Company

December 22, 1992

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I. Introduction.

By memorandum and order dated November 17, 1992, the Atomic Safety and Licensing Board (the "Board") dismissed the October 22, 1992 petition of Marvin B. Hobby for lack of standing and deferred its decision on the petition of Allen L. Mosbaugh (the "Petition") pending receipt of Mr. Mosbaugh's amended petition and the answers thereto by Georgia Power Company ("GPC") and the NRC Staff. The Board ordered that Mr. Mosbaugh include in his amended petition a clear statement of the proportion of the year during which he resides at his realty in Grovetown, Georgia, as well as

the nature and extent of all contacts with Plant Vogtle that he claims to be a basis for his standing in this case.

The Board also said Mr. Mosbaugh "must show that he has a basis to believe that if we prohibit the [license amendments] he will be better off...." Board's Order at 5.

On December 9, 1992, Mr. Mosbaugh (also referred to herein as the "petitioner") served by telex an "Amendment to Petition to Intervene and Request for Hearing" (the "Amended Petition").[1/]

The Petition and Amended Petition should be dismissed for lack of standing. Mr. Mosbaugh has failed to show that he will incur any injury in fact as a result of the proposed license amendments.[2/] In addition, petitioner has not established standing based on residency and, on information and belief, petitioner has falsified his averments

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[1/] While on its face the Amended Petition is submitted by and on behalf of both Mr. Hobby and Mr. Mosbaugh, for the reasons stated herein, Mr. Hobby is no longer recognized as a petitioner in this proceeding.

GPC notes that the Amended Petition was not properly served upon GPC in accordance with the Board's Order. GPC reserves the right to raise such improper service as a bar to petitioner's participation in this proceeding, if necessary.

[2/] The background of the proposed license amendments is set forth in "Georgia Power Company's Answer to the October 22, 1992 Petition of Allen L. Mosbaugh and Marvin B. Hobby to Intervene in a License Amendment Proceeding," dated November 6, 1992 ("GPC's Answer to the Petition").

concerning residency. Furthermore, contrary to the Board's November 17, 1992 Order (the "Board's Order"), petitioner has not shown how he will be "better off" if the Board stops the license amendments.

Additionally, the Amended Petition should be denied for failure to comply with the Nuclear Regulatory Commission's ("NRC" or "Commission") new pleading requirements applicable to contentions at 10 C.F.R. § 2.714(b). Petitioner has not shown that there exists any genuine dispute on a material issue of law or fact. Petitioner has not shown any error or omission in the license amendment application nor has he put forth any credible basis for his conclusory contentions that his "allegations" must be resolved by this Board before the license amendments can be issued. The historical allegations set forth in the Amended Petition as the "bases" for petitioner's contention were submitted by petitioner to the NRC over two years ago and are currently being addressed by the NRC staff or otherwise being investigated.[3/] Moreover, petitioner's contentions and their bases are outside the scope of the October 14, 1992 Federal Register notice (57 Fed. Reg. 47128).

[3/] See letters from Mr. Thomas E. Murley, NRC Director of Nuclear Reactor Regulation, to Michael D. Kohn, Esq., dated October 23, 1990 and January 22, 1992 attached hereto as composite Exhibit 1 and made a part hereof.

Petitioner's obvious intent is to have this Board adjudicate historical allegations concerning the early stages of formation of the Southern Nuclear Operating Company ("Southern Nuclear") and other allegations of improper actions by GPC during the 1990-91 time frame. The allegations, however, have no actual connection to the change proposed by the license amendments since there will be no substantive change in the individuals constituting the Vogtle management organization once the license amendments are implemented.

II. The Amended Petition Of Marvin B. Hobby Must Be Rejected.

Since the Amended Petition has been submitted on behalf of both Mr. Mosbaugh and Mr. Hobby, it ignores the Board's Order dismissing Mr. Hobby's petition. However, Mr. Hobby's time for appeal of the Board's Order dismissing his petition expired ten days after service of such Order. See 10 C.F.R. § 2.714a(a). Mr. Hobby did not file any appeal in accordance with NRC's Rules of Practice. Therefore, Mr. Hobby can no longer participate as a party in this proceeding. GPC requests that all references to Mr. Hobby in the Amended Petition be ordered stricken by the Board and

counsel for Mr. Mosbaugh instructed to adhere to the NRC's Rules of Practice.

III. Allen L. Mosbaugh Lacks Standing To Be A Party In This License Amendment Proceeding.

A. Mr. Mosbaugh has No Contacts with Plant Vogtle.

The Board's Order, at p. 10, required that Mr. Mosbaugh state "the nature and extent of all contacts with the plant that he claims to be a basis for his standing in this case." Petitioner has failed to demonstrate any such contacts in the Amended Petition. Indeed, GPC is aware of no such contacts. Therefore, Mr. Mosbaugh's only basis for standing is his ownership of real property within 50 miles of Plant Vogtle and his assertion that such real property constitutes his "primary residence."

B. Mr. Mosbaugh's Primary Residence is Not Grovetown, Georgia; it is Amelia, Ohio.

Mr. Mosbaugh alleges that property which he owns at 1701 Kings Court, Grovetown, Georgia, approximately 35 miles from Plant Vogtle, is his "primary residence." GPC disputes this on the basis that Mr. Mosbaugh (1) receives no mail at

that address, (2) has moved his family to Ohio, where his children attend school, and (3) is registered to vote in Clermont County, Ohio.

On November 6, 1992, the Grovetown Post Office reported to the undersigned that Mr. Mosbaugh's new address is 2692 Boggs Road, Amelia, Ohio. See copy of letter from John Lamberski, Esq. to Grovetown Post Master, dated November 5, 1992, attached hereto as Exhibit 2 and made a part hereof, with handwritten note by a Post Office employee. Also, when the Department of Labor attempted to forward a copy of Judge Glennon's October 30, 1992 Recommended Decision and Order to Mr. Mosbaugh's Grovetown address, the Post Office returned it marked "undeliverable as addressed, unable to forward." See letter from Jesse P. Schaudies, Jr., Esq. to Michael D. Kohn, Esq., dated November 16, 1992, attached hereto as Exhibit 3 and made a part hereof.[4/] Also, on information and belief, Mr. Mosbaugh has moved his family to Ohio, where his children now attend school.

[4/] During this holiday season, GPC is reminded of the whimsical film production "Miracle on 34th Street" (Twentieth Century Fox 1947) in which a seasoned New York State jurist ruled that "since the [Post Office Department, a branch of the] U.S. Government believes this man to be Santa Claus, this court will not dispute it." Similarly, this Board should take notice of the Post Office's documentation of Mr. Mosbaugh's legal address.

Additionally, Mr. Mosbaugh is registered to vote in Clermont County, Ohio. The Board of Elections Office of Clermont County, Ohio has confirmed that Mr. Mosbaugh registered to vote in Ohio on September 18, 1992. See Affidavit of Ms. Cynthia M. Crane, attached hereto as Exhibit 4 and made a part hereof. Mr. Mosbaugh's voter registration application, which he signed under penalty of election falsification, clearly states that Mr. Mosbaugh's only residence is Clermont County, Ohio, where he voted in the 1992 general election, that he has no other mailing address and that his previous address was Grovetown, Georgia. Furthermore, contrary to the statement in the Amended Petition, there is no record that Mr. Mosbaugh voted in any election in Columbia County, Georgia in 1992. See the certified copy of Mr. Mosbaugh's Columbia County, Georgia voting record attached to Ms. Crane's affidavit (Exhibit 4).

Significantly, Mr. Mosbaugh is no longer a legal resident of the State of Georgia for purposes of voting under Georgia law. Section 21-2-241, "Rules for determining residence," of the Official Code of Georgia Annotated provides, in relevant part:

> In determining the residence of a person desiring to register to vote, the following rules shall be followed so far as they are applicable:

. . . .

> (2) A person shall not be considered to have lost his residence who leaves his home and goes into another state . . . for temporary purposes only, with the intention of returning, unless said person shall register to vote or perform other acts indicating a desire to change his citizenship and residence;
>
> . . . .
>
> (12) If a person goes into another state and while there exercises the right of a citizen by voting, he shall be considered to have lost his residence in this state.

The Board's Order, at p. 10, required Mr. Mosbaugh to state the "proportion of the year during which [he] resides at his [Grovetown] realty...." The Amended Petition simply states that Mr. Mosbaugh "resides at his residence approximately one week each month." GPC questions this assertion and suggests that the loose phraseology, "approximately one week each month," fails to comply with the Board's Order.

As stated in GPC's Answer to the Petition (p. 14), Mr. Mosbaugh's occasional visits to the Augusta area should be found insufficient as a basis for standing.[5/] See

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[5/] The NRC's Rules of Practice concerning standing to intervene in a license amendment proceeding were stated in GPC's November 6, 1992 Answer to the Petition and, therefore, won't be repeated here.

Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 337-38 (1979).

C. Mr. Mosbaugh has Not Demonstrated Injury in Fact.

In its November 17, 1992 Order, the Board observed that in the case of an operating license amendment, residence alone within the 50-mile radius does not automatically establish standing. Board's Order at 7 citing Boston Edison Company (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98-99, aff'd on other grounds, ALAB-816, 22 NRC 461 (1985). "Absent situations with obvious potential for offsite consequences, [in order to establish standing] a petitioner must allege some specific injury in fact that will result from the action taken." Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 186 (1991) citing Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-92-23, pp. 15-16, 1992 NRC LEXIS 40 (August 20, 1992). The "injury in fact" sufficient to support standing must be actual or imminent, not "conjectural" or "hypothetical." Whitmore v. Arkansas, 495 U.S. 149, at 155, 110 S.Ct. 1717,

1723 (1990), quoted favorably in Lujan v. Defenders of Wildlife, ___ U.S. ___, 112 S. Ct. 2130, 2136 (1992).

The injury articulated by the petitioner ("increase in risk") is too remote and speculative to serve as a basis for standing. No change in the risk profile of the plant can be reasonably foreseen as a result of the change proposed by the license amendments; the Amended Petition fails to set forth any credible injury in fact that will result from the proposed license amendments. The contentions set forth in the Amended Petition assert that the proposed transfer of the Plant Vogtle operating licenses to Southern "represents an increase [sic] risk in [sic] to the health and safety of the public and/or represents a potential unsafe operating condition which must be corrected" before the amendments are issued. However, the allegations set forth in the Amended Petition in support of the contentions do not relate to the change proposed by the license amendments. They simply relate to past actions of GPC management with respect to the first phase of the establishment of Southern Nuclear and other alleged improper actions of GPC in the 1990-91 time frame. They do not assert, and indeed cannot establish, that the proposed transfer of the operating licenses to Southern Nuclear (the last and third phase of the

transition) will result in an increased risk to public health and safety.[6/]

In the case of the proposed license amendments, an incremental increase in the potential for any adverse offsite consequences arising from the assumption of operating responsibilities by Southern Nuclear is inconceivable. On October 27, 1992, the NRC Staff issued an "Environmental Assessment and Finding of No Significant Impact" in connection with the proposed license amendments. In that Environmental Assessment the NRC staff concluded that the proposed license amendments would result in no radiological or nonradiological environmental impact. Again, there will be no change to the facility and virtually no change in the individual personnel who, on a day to day basis, operate and manage the Plant Vogtle Units.

Mr. Mosbaugh has not adequately alleged an injury in fact and his Petition and Amended Petition should be denied for the same reasons that standing was denied the petitioner in Sacramento Municipal Utility District, LBP-92-23. In that case, the petitioner failed to allege (1) that offsite

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[6/] The relationship of the petitioner's allegations to potential risk to public health and safety is so attenuated as to be conjectural. None of the allegations address operational activities at the plant or those individuals involved in day-to-day operational decisions such as SROs, ROs, or operations department management.

consequences similar to those attendant the operation of a facility for which a construction permit is sought could result from the challenged action (decommissioning), and (2) a factual basis supporting its thesis that the proposed action would result in an increased risk to petitioner's members. Likewise, the Amended Petition has not alleged (1) that the incremental increase in risk resulting from the license amendments is significant, or (2) a factual basis showing how the proposed license amendments will increase risk to the petitioner. Id. at 15-16.[1/]

D. Mr. Mosbaugh would not be "Better Off" if the Board were to Grant his Petition.

The Amended Petition, at note 1, states:

> where the individual managers associated with Southern Nuclear have functioned and/or continue to function as GPC managers, their role in GPC management is irrelevant to this Board's consideration as to whether Southern Nuclear has the requisite character, competence, integrity, candor, truthfulness and willingness to abide by regulatory requirements necessary before this Board may replace GPC as the sole licensed operator of [P]lant Vogtle.

The petitioner misunderstands the jurisdiction of this Board. This Board has been established to "rule on

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[1/] Indeed, much of the language of the contentions set forth in the Amended Petition is hypothetical in that they refer to "potential" unsafe conditions.

petitions for leave to intervene and/or requests for hearing and to preside over the proceedings in the event that a hearing is ordered." 57 Fed. Reg. 54430. The Board noted in its November 17, 1992 Order, at p. 5, as follows:

> Since Georgia Power Company already has an operating license, we have no authority in this proceeding to revoke that license or to stop the plant from operating. The only authority we have is to stop the change of the responsibility for operations from one subsidiary to another. Petitioner must show that he has a basis to believe that if we prohibit the change he will be better off -- presumably because the new arrangement is less safe than the existing one.

The petitioner's statement concerning continuity of management, quoted above, is wrong; the fact that the Southern Nuclear management of which petitioner complains is comprised of virtually the same managers and officers as the existing GPC management responsible for day to day operations of Plant Vogtle is significant, and dispositive, in considering the issue of petitioner's standing.

The Commission's pleading requirements, set forth in § 2.714(a)(2) and (d)(1)(iii), require petitioner to set forth with particularity "the possible effect of any order [of the Board] that may be entered in the proceeding on the petitioner's interest," i.e., how the injury alleged is likely to be remedied by a favorable decision granting the

relief requested. Public Service Company of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-68 (1991); Nuclear Engineering Company, Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978); Long Island Lighting, 33 NRC at 185-86 citing Dellums v. NRC, 863 F.2d 968, 971 (D.C. Cir. 1988).

In this proceeding, a decision by the Board to stop the proposed license amendments would preserve the status quo, including the continued management by GPC officers over licensed activities at Plant Vogtle. If, on the other hand, the license amendments are approved, those GPC officers and employees responsible for day to day operations at Plant Vogtle would continue to perform their duties except they would be officers and employees of Southern Nuclear only, ultimately reporting to Southern Nuclear's Board of Directors. The Board's denial of the amendments would not resolve the management issues raised by petitioners. Therefore, petitioner has not and cannot demonstrate that he will be "better off" if the Board stops the proposed license amendments.

IV. Allen L. Mosbaugh Cannot Be Admitted As A Party To This Proceeding Because He Has Failed To Proffer At Least One Admissible Contention.

A. Mr. Mosbaugh has Failed to Show that a Genuine Dispute Exists on a Material Issue of Law or Fact.

The NRC Rules of Practice applicable to pleading of contentions contained in 10 C.F.R. § 2.714(b)(1) provide that, in order to be admitted as a party to this proceeding, petitioner must submit at least one contention which complies with the provisions of 10 C.F.R. § 2.714(b)(2) as follows:

> Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:
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> i) A brief explanation of the bases of the contention.
>
> ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.
>
> (iii) Sufficient information (which may include information pursuant to paragraphs (b) (2) (i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the

> petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

The pleading requirements quoted above are relatively new, having been revised on August 11, 1989. 54 Fed. Reg. 33168-82. They were designed to "raise the threshold for the admission of contentions to require the proponent of the contentions to supply information showing the existence of a genuine dispute with the applicant on an issue of law or fact." 54 Fed. Reg. 33168. The Statement of Consideration for the new rule further explains that the rule

> will also require intervenors to submit with their list of contentions sufficient information. . . to show that a genuine dispute exists. . . . This will require the intervenor to read the pertinent portions of the license application. . . state the applicant's position and the petitioner's opposing view.
>
> . . . .
>
> The Commission believes it to be a reasonable requirement that before a person or organization is admitted to the proceeding it read the portions of the application. . . that address the issues that are of concern to it and demonstrate that a dispute exists between it and the applicant on a material issue of fact or law.

54 Fed. Reg. at 33170-71.

The Commission has required strict compliance with these new pleading requirements. See Arizona Public Service Company (Palo Verde Nuclear Generating Stations, Units 1, 2

and 3), CLI-91-12, 34 NRC 149, 155-56 (1991) (the basis for a contention was rejected where petitioner failed to "explain the basis for the contention and read the relevant parts of the license application and show where the application was lacking").

Mr. Mosbaugh has failed to provide any bases for the most critical portion of his contentions. That is, he has not provided a factual or legal basis for why the management allegations he has raised must be resolved (1) by this Board, and (2) before the proposed license amendments can be issued. This showing is especially crucial when the management allegations raised by petitioner are two years old, will require further action by the NRC irrespective of the ultimate decision of this Board, and to some extent involve individuals who have since retired.[8/] Petitioner's contentions should be rejected for failure to provide even minimal support for his conclusional assertions that his management allegations must be resolved by this Board and before the license amendments can be issued. See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 415 (1990).

[8/] As of November 1, 1992, Mr. Joseph M. Farley retired from his positions at Southern Nuclear and The Southern Company after 40 years of loyal service.

Petitioner's contentions and bases are deficient for the same reasons that a contention was rejected in Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-91-39, 34 NRC 273 (1991). LILCO was a proceeding to amend the Shoreham operating license to a possession-only license ("POL"). The petitioner therein contended that the POL could not be issued before an environmental impact statement was prepared to consider the impact of the proposal to decommission Shoreham. The ASLB held that the contention was inadmissible because the petitioner did not

> spell out how the POL amendment is an interdependent part of the decommissioning process and how that amendment is insufficient except as part of that process. . . Further, the Commission has made it clear that the new pleading requirements of section 2.714(b) are to be enforced rigorously and that we are not free to assume any missing information in a contention.

Id. at 279 citing Arizona Public Service, 34 NRC 149.

Additionally, Mr. Mosbaugh has failed to identify any portion of GPC's application which is lacking. Where a petitioner fails to show that there is any error or omission in the [license amendment] application, his contentions must be rejected. See Florida Power & Light Company (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 530 (1990).

Furthermore, Mr. Mosbaugh has not cited any legal authority for his contention that his management allegations must be resolved before the proposed license amendments can be issued. Such a failure to provide a reference to the legal authority under which the license amendment application (i.e., the "legal basis") should be judged has been held to be necessary to comply with 10 C.F.R. § 2.714. See Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-21, 33 NRC 419, 422 (1991), appeal dismissed, CLI-92-03, 35 NRC 63 (1992).

Petitioner has failed to establish that there is any genuine dispute on an issue of law or fact which is material to this licence amendment proceeding. Stated concisely, the petitioner has not shown or plead any credible, rational nexus between the change proposed by the license amendments and his contention that such license amendments will result in an increased risk to public health and safety. Such a nexus is an essential element to establishing an admissible contention. See Florida Power and Light, 31 NRC at 526, 527, 535 (contentions were not admissible where the petitioner failed to show any significant safety concern or that the proposed license amendment made any substantive change in prior operations).

Additionally, this Board should not permit the petitioner to incorporate by reference into the Amended Petition other documents when petitioner has made no attempt to direct specific attention to pertinent portions germane to the scope of this proceeding. See Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-76-10, 3 NRC 209, 216 (1976) ("non-selective incorporation works to frustrate the requirement in § 2.714 that the supporting affidavit set forth 'with particularity the facts pertaining to [petitioner's] interest and the basis for his contentions with regard to each aspect on which he desires to intervene'"). Furthermore, it would be inappropriate for the Board to consider any information, such as reports of the NRC Office of Investigations, in making its decision without making such information available to the parties. See Louisiana Power & Light Company (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 46-47 (1985) citing 49 Fed. Reg. 36032 (1984).

B. Mr. Mosbaugh's Contentions and Bases are Outside the Scope of this Proceeding.

The NRC Federal Register notice which published the proposed license amendments and offered an opportunity for a

hearing provided that any contentions submitted by a petitioner "shall be limited to matters within the scope of the amendment under consideration." 57 Fed. Reg. 47128. In determining whether it is empowered to entertain a particular matter, a licensing board must respect the terms of the notice of opportunity for a hearing for the proceeding in question. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980). Proposed contentions must fall within the scope of the issues set forth in the notice of hearing. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

This Board, therefore, is not empowered to entertain matters which are not within the scope of the proposed license amendments. GPC submits that the petitioner's contentions and bases are outside the scope of the license amendments.

Contention 1.

The bases of petitioner's contention 1 are concerned solely with "Phase I" of the development of Southern Nuclear. Phase I began on November 1, 1988 and continued until January, 1991. Phase I consisted of the consolidation

of Southern system personnel with nuclear expertise, other than those from the plants, into a single, central location referred to as the "SONOPCO Project." In Phase I, the Southern system personnel from GPC, Alabama Power Company ("APC") and Southern Company Services, Inc. ("SCSI") remained employees of GPC, APC and SCSI, respectively. The factual bases of the Amended Petition make clear that petitioner's contention 1 is limited to historical actions of GPC managers in connection with the early stages of the formation of Southern Nuclear which are outside the scope of the proposed license amendments.[9/] The scope of the proposed license amendments is the change from the GPC organization currently operating Plant Vogtle to the Southern Nuclear organization proposed as the prospective operator of Plant Vogtle.[10/] The historical actions of

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[9/] This is especially true of that portion of contention 1 which focuses on the parent company of GPC and Southern Nuclear. That entity is not an NRC licensee or a party to this proceeding.

[10/] In the parlance of Southern system personnel, the change is from Phase II to Phase III of the formation of Southern Nuclear and is not concerned with Phase I. Phase II began in January 1991 with the incorporation of Southern Nuclear and the transfer of GPC, APC and SCSI personnel, except for most plant personnel, to the ranks of Southern Nuclear. In Phase II, management personnel above the plant manager are officers of both Southern Nuclear and, in the case of Plant Vogtle, GPC, with the President of GPC ultimately responsible for licensed activities. Phase III will begin when the NRC issues the license amendments at issue in this proceeding. In Phase III all plant personnel

personnel, such as Mr. Farley, or other personnel who will not be part of Southern Nuclear are irrelevant. Likewise, any historic confusion about the Phase I "SONOPCO Project" organization in the minds of GPC officers in 1990 is irrelevant to the proposed license amendments.[11/] Further,

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will become Southern Nuclear employees and management will no longer be officers of GPC but will be officers of Southern Nuclear only reporting to the Southern Nuclear Board of Directors. Significantly, GPC President, Mr. Dahlberg, is a member of the Southern Nuclear Board.

[11/] Contentions 1 and 4 should be dismissed on the basis of collateral estoppel. The factual basis for contention 1, as well as contention 4, that The Southern Company created a de facto corporation and exercises management control over licensed activities, has been previously adjudicated. Specifically, the issues of control over staffing of the SONOPCO Project and the relationship between Mr. A. William Dahlberg, Georgia Power President, and Mr. R. Patrick McDonald, Georgia Power Executive Vice President, and between Mr. McDonald and Mr. Joseph Farley, formerly Executive Vice President of The Southern Company and Executive Vice President of Southern Company Services, Inc. were fully litigated in Hobby v. Georgia Power Company, Department of Labor Case No. 90-ERA-30, decided November 8, 1991. Petitioner makes many references in the Amended Petition to that proceeding, but does not inform this Board of the Recommended Decision entered in that proceeding, a copy of which is attached hereto as Exhibit 5 and made a part hereof. After carefully reviewing the various allegations in that matter and, in passing, finding some of Mr. Hobby's testimony "totally unbelievable," the Honorable Joel R. Williams found:

> Perhaps he had become as convinced as I am that Mr. McDonald did, in fact, take his management direction from Mr. Dahlberg in regard to the two nuclear plants owned, in part, by Georgia Power. Certainly, any doubts in his mind concerning the same should have been dispelled by the August 1989 meeting in

any alleged wrongdoing which petitioner subscribes to Mr. McDonald, Executive Vice President of GPC and President of Southern Nuclear, is outside the scope of this proceeding. Mr. McDonald is now the senior nuclear operations officer responsible for licensed activities, reporting to GPC's President, Mr. Dahlberg. After the license amendments are issued, Mr. McDonald will continue to be the senior nuclear operations officer responsible for licensed activities reporting to the Southern Nuclear Board of Directors.[12/] There will be virtually no change in Mr. McDonald's oversight responsibilities for the nuclear operations of Plant Vogtle.

In the case of Detroit Edison Company (Enrico Fermi Atomic Power Plant Unit 2), LBP-78-11, 7 NRC 381, 386, aff'd, ALAB-470, 7 NRC 473 (1978), the board found that the

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> reference to the Public Service Commission case. The evidence referable to what transpired at this meeting clearly established that Mr. Dahlberg exercised control over Mr. McDonald regarding Georgia Power's nuclear operations.

Recommended Decision at p. 42. In addition to other bases, then, the petitioner is barred by the doctrine of collateral estoppel and its underlying policies from re-contesting the issue of Georgia Power (i.e. Mr. Dahlberg) management control over nuclear operations.

[12/] Again, GPC's President, Mr. Dahlberg, is a member of the Southern Nuclear Board.

issue of whether the licensee violated NRC regulations by transferring an ownership interest in advance of NRC action on the license amendment at issue in the proceeding was outside the scope of its jurisdiction. Likewise, in this case the Board should reject petitioner's contentions which seek to litigate historical allegations concerning GPC's actions during the early stages of formation of Southern Nuclear.

Contentions 2, 3 and 4.

The bases for petitioner's contentions 2, 3 and 4 are nothing but a regurgitation of the allegations submitted by petitioner to the NRC as a part of his September 11, 1990 petition and the supplements thereto.[13/] These allegations have been addressed in detail by GPC and have been before the NRC Director of Nuclear Reactor Regulation and his staff for over two years. These allegations, as well as contentions 2, 3 and 4 are not associated with the change proposed and are therefore outside the scope of this license amendment proceeding.

GPC respectfully submits that this Board is not empowered to consider and resolve the allegations of

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13/ That September 11, 1990 petition expressly proffered the issues as "allegations."

petitioner concerning the existing management of Plant Vogtle. The Board's jurisdiction is limited to ruling on petitions to intervene and thereafter, if necessary, whether the changes proposed by the license amendments should be sustained. The Board is not empowered to admit contentions which seek to litigate GPC's past compliance with NRC regulations. See Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 168 (1991) (in the context of a license amendment proceeding concerning security plan amendments, the licensing board refused to admit a contention inviting an inquiry into the adequacy of the previous security plan or the licensee's performance under the previous version of the security plan).

V. This Proceeding Is An Inappropriate Forum To Address Petitioner's Concerns.

As previously stated, the allegations contained in the Amended Petition are simply a recasting of the allegations contained in petitioner's September 11, 1990 petition and the supplements thereto. That petition has been addressed, in detail, by written submissions of GPC to NRC, dated September 28, 1990, April 1, 1991 and October 3, 1991, and is currently before the NRC's Director of Nuclear Reactor

Regulation. See n. 3, supra. It would be inappropriate for this Board to take cognizance of the petitioner's allegations of historic noncompliance when those allegations are directly before the NRC Staff or subject to on-going investigations within or outside of the NRC. See Detroit Edison Company, 7 NRC at 386 ("The responsibility for determining whether a license or permit was violated rests with the Director of Nuclear Reactor Regulation pursuant to the provisions of 10 C.F.R. [Sections 2.200 - 2.206] of the Commission's regulations."). Cf. Louisiana Power and Light (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986) ("The bare pendency of an investigation does not indicate that there is a substantive problem, or even that there has been a violation.").

In Sacramento Municipal Utility District, LBP-92-23, the licensing board ruled on a petition to intervene in a proceeding to consider a proposed order approving a decommissioning plan for, and authorizing decommissioning of, the Rancho Seco plant. The petitioner contended that SMUD lacked an adequate funding plan for decommissioning. The licensing board declined to entertain the contention since the NRC had agreed to consider the petitioner's views in its ruling on an exemption from the decommissioning funding rule and since, if the exemption was denied, the

Staff would have to take steps to ensure that SMUD provides adequate funding for decommissioning. Id. at 32. Similarly, the matters which the petitioner seeks to have this Board adjudicate, are matters which are before the NRC Staff for consideration. As evidenced by the activities of NRC inspectors discussed in various inspection reports provided to GPC, the Staff has already addressed the vast majority of the scope of allegations contained in the petitioner's September 11, 1990 petition. Thus, the NRC is considering petitioner's allegations and will take whatever steps it determines are necessary to ensure that Plant Vogtle's operations are in compliance with NRC regulations. Under these circumstances, it would be inappropriate for this Board to entertain petitioner's allegations.

VI. Limited Appearance Statements Are Inappropriate At This Stage Of The Proceeding.

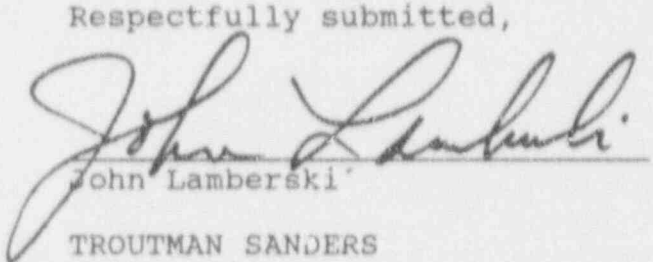
On December 15, 1992 the Board served a notice (the "Notice") concerning limited appearances and a prehearing conference. GPC respectfully submits that it is inappropriate to allow limited appearance statements at this stage of a proceeding when the Board has not yet ruled that petitioner has standing to intervene or that he has proffered at least one admissible contention. Therefore,

GPC requests that the Board reconsider its Notice and amend it to provide that (1) no limited appearance statements will be heard at or before the January 12, 1993 prehearing conference, and (2) limited appearance statements will be permitted after January 12, 1993 only if the Board decides to admit petitioner as a party to this proceeding.

VII. Conclusion.

For the reasons stated above, GPC requests that the October 22, 1992 Petition to Intervene and Request for Hearing of Allen L. Mosbaugh and his December 9, 1992 Amendments to Petition to Intervene and Request for Hearing be denied.

Respectfully submitted,



John Lamberski

TROUTMAN SANDERS
Suite 5200
600 Peachtree Street, N.E.
Atlanta, GA 30308-2216
(404) 885-3000

DATED: December 22, 1992

'92 DEC 23 A10:25

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

GEORGIA POWER COMPANY, et al.	*	Docket Nos. 50-424-OLA-3 50-425-OLA-3
	*	
	*	
(Vogtle Electric Generating Plant, Units 1 and 2)	*	Re: License Amendment (Transfer to Southern Nuclear)
	*	
	*	ASLBP No. 96-671-01-OLA-3

CERTIFICATE OF SERVICE

This is to certify that copies of the within and foregoing "Georgia Power Company's Answer to the December 9, 1992 Amended Petition of Allen L. Mosbaugh" were served on all those listed on the attached service list by depositing same with an overnight express mail delivery service.

This is the 22nd day of December, 1992.

John Lamberski

John Lamberski

TROUTMAN SANDERS
Suite 5200
600 Peachtree Street, N.E.
Atlanta, GA 30308-2216
(404) 885-3000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

GEORGIA POWER COMPANY, et al.	*	Docket Nos. 50-424-OLA-3 50-425-OLA-3
	*	
	*	
(Vogtle Electric Generating Plant, Units 1 and 2)	*	Re: License Amendment (Transfer to Southern Nuclear)
	*	
	*	ASLBP No. 96-671-01-OLA-3

SERVICE LIST

Administrative Judge
Peter B. Block, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge
James H. Carpenter
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge
Thomas D. Murphy
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Michael D. Kohn, Esq.
Kohn, Kohn & Colapinto, P.C.
517 Florida Avenue, N.W.
Washington, D.C. 20001

Stewart D. Ebneter
Regional Administrator
USNRC, Region II
101 Marietta Street, NW
Suite 2900
Atlanta, Georgia 30303

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555
ATTN: Docketing and Services Branch

Charles Barth, Esq.
Office of General Counsel
One White Flint North
Stop 15B18
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Director,
Environmental Protection Division
Department of Natural Resources
205 Butler Street, S.E.
Suite 1252
Atlanta, Georgia 30334

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

October 23, 1990

Docket Nos. 50-321 and 50-366
50-424 and 50-425
(10 C.F.R. Section 2.206)

Michael D. Kohn, Esq.
Kohn, Kohn & Colapinto, P.C.
517 Florida Avenue, NW.
Washington, DC 20001

Dear Mr. Kohn:

This letter is to acknowledge receipt of a "Request for Proceedings and Imposition of Civil Penalties for Improperly Transferring Control of Georgia Power Company's Licenses to the SONOPCO Project and for the Unsafe and Improper Operation of Georgia Power Company Licensed Facilities" (Petition) which you submitted to the Chairman of the U.S. Nuclear Regulatory Commission (NRC) on September 11, 1990, on behalf of Messrs. Marvin B. Hobby and Allen L. Mosbaugh. The Petition has been referred to my office for preparation of a Director's Decision pursuant to Section 2.206 of Title 10 of the Code of Federal Regulations (10 CFR). Although the Exhibits referred to in the Petition did not accompany it, you subsequently submitted those exhibits to the NRC on September 21, 1990. In addition, we have received a supplement to the Petition dated October 1, 1990.

The Petitioners are employees or former employees of the Georgia Power Company (GPC) which holds licenses from the NRC for the operation of a number of nuclear facilities including the Vogtle facility. The Petitioners make a number of allegations regarding the management of GPC nuclear facilities. Specifically, the Petition alleges illegal transfer by GPC of its operating licenses to The Southern Company and to SONOPCO, knowing misrepresentations by GPC in responding to concerns of a Commissioner regarding the chain of command for the Vogtle facility, intentional false statements to the NRC to mislead the NRC regarding the reliability of a diesel generator whose failure had resulted in a Site Area Emergency at Vogtle, perjured testimony submitted by a GPC executive during the course of a proceeding under Section 210 of the Energy Reorganization Act, repeated abuse at the Vogtle facility of Technical Specification 3.0.3, repeated willful Technical Specification violations at the Vogtle facility, repeated concealment of safeguards problems from the NRC, operation of the radioactive waste systems and facilities at Vogtle in gross violation of NRC requirements, and the routine use at GPC nuclear facilities of non-conservative and questionable management practices.

As a result of recent events relating to operational activities at the Vogtle facility and earlier receipt by the NRC of several allegations similar to those raised in the Petition, the NRC has performed several investigations and inspections at the Vogtle facility aimed at determining the facts surrounding each allegation and at determining the safety significance of each issue. I have determined that, while the issues raised in the Petition are cause for concern, no immediate action is necessary regarding these matters. I have reached this determination with the benefit of the NRC inspections and ongoing investigations noted above. As provided by Section 2.206, the NRC will take action with regard to the specific issues raised in the Petition within a reasonable time.

For your information, I have enclosed a copy of the Notice that is being filed with the Office of the Federal Register for publication.

Sincerely,

Thomas E Murley

Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

Enclosure:
As stated

cc w/enclosure:
See next page

cc:
Mr. J. A. Bailey
Manager - Licensing
Georgia Power Company
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Birmingham, Alabama 35201

Mr. G. Bockhold, Jr.
General Manager, Vogtle Electric
Generating Plant
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Burke County Commission
Waynesboro, Georgia 30830

Office of Planning and Budget
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Vice President - Nuclear, Vogtle Project
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Executive Vice President -
Nuclear Operations
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Mr. J. Leonard Ledbetter, Director
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Program Director of
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Tucker, Georgia 30085

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Washington, DC 20036

Mr. W. G. Hairston, III
Senior Vice President -
Nuclear Operations
Georgia Power Company
P.O. Box 1295
Birmingham, Alabama 35201

(7590-01)

U.S. NUCLEAR REGULATORY COMMISSION

DOCKET NOS. 50-321, 50-366, 50-424 AND 50-425

GEORGIA POWER COMPANY

EDWIN I. HATCH NUCLEAR PLANT AND

VOGTLE ELECTRIC GENERATING PLANT

RECEIPT OF PETITION FOR DIRECTOR'S DECISION UNDER 10 C.F.R. SECTION 2.206

Notice is hereby given that attorneys for Messrs. Marvin B. Hobby and Allen L. Mosbaugh submitted to the Chairman of the Nuclear Regulatory Commission (NRC) on September 11, 1990, a "Request for Proceedings and Imposition of Civil Penalties for Improperly Transferring Control of Georgia Power Company's Licenses to the SONOPCO Project and for the Unsafe and Improper Operation of Georgia Power Company Licensed Facilities" (Petition). A supplement to the Petition was also submitted October 1, 1990. The Petitioners are employees or former employees of the Georgia Power Company (GPC) and the Petition makes a number of allegations regarding the management of GPC nuclear facilities, particularly the Vogtle facility. Included were allegations of deliberate misrepresentations by GPC to the NRC and deliberate violations of nuclear safety requirements. The Petition sought immediate and swift action by the NRC based on its allegations. In a letter dated October 23, 1990, acknowledging receipt of the Petition, I have determined that no immediate action by the NRC, other than certain actions already undertaken, is necessary regarding the matters raised in the Petition.

The Petition has been referred to the Director of the Office of Nuclear Reactor Regulation for the preparation of a Director's Decision pursuant to 10 C.F.R. Section 2.206. As provided by Section 2.206, appropriate action will be taken with regard to the Petition within a reasonable time.

A copy of the Petition is available for inspection at the Commission's Public Document Room at 2120 L Street, NW., Washington, DC 20555, and at the Local Public Document Rooms for the Hatch facility located at Appling County Public Library, 301 City Hall Drive, Baxley, Georgia 31513, and the Vogtle facility located at Burke County Library, 412 Fourth Street, Waynesboro, Georgia 30830. The supplement to the Petition is being withheld from the Public Document Rooms pending an NRC determinaton regarding Petitioner's request for withholding.

FOR THE NUCLEAR REGULATORY COMMISSION

Thomas E. Murley

Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland
this 23rd day of October , 1990

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

January 22, 1992

Docket Nos. 50-321 and 50-366
and 50-424 and 50-425
(10 CFR Section 2.206)

Michael D. Kohn, Esquire
Kohn, Kohn & Colapinto, P.C.
517 Florida Avenue, NW.
Washington, DC 20001

Dear Mr. Kohn:

This letter is to inform you of the status of the September 11, 1990, "Request for Proceedings and Imposition of Civil Penalties for Improperly Transferring Control of Georgia Power Company's Licenses to the SONOPCO Project and for the Unsafe and Improper Operation of Georgia Power Company Licensed Facilities" (Petition) that you filed with the U.S. Nuclear Regulatory Commission (NRC) on behalf of Messrs. Marvin Hobby and Allen Mosbaugh (Petitioners), pursuant to Section 2.206 of Title 10 of the Code of Federal Regulations (10 CFR 2.206). The NRC received exhibits to support the Petition on September 21, 1990, and a supplement to the Petition on October 1, 1990. By letter dated October 23, 1990, I acknowledged receipt of the Petition and concluded that no immediate action was necessary regarding these issues.

On August 26, 1991, I acknowledged receiving the July 8, 1991, amendments you submitted and informed you that I had determined that no immediate action was appropriate.

On December 19, 1991, we received a letter from the Licensee dated December 10, 1991, which provided additional information associated with several allegations made by the Petitioners. The Licensee has forwarded a copy of their December 10, 1991, letter to you.

Because of the large number of complex issues raised by the Petitioners, the extensive additional information provided us since the original Petition, and the most recent supplemental information provided by the Licensee, we will require additional staff effort to evaluate all pertinent information before issuing a Director's Decision.

As provided by 10 CFR 2.206, the NRC staff will take action regarding the specific issues raised within a reasonable time.

Sincerely,

Thomas E. Murley

Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

cc: See next page

cc:
Mr. J. A. Bailey
Manager - Licensing
Georgia Power Company
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Birmingham, Alabama 35201

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General Manager, Vogtle Electric
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Georgia Power Company

cc:
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Manager Licensing - Hatch
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Chairman
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A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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TELEPHONE: 404-885-3000
FACSIMILE: 404-885-3900

JOHN LAMBERSKI

DIRECT: 404-885-3360

November 5, 1992

Post Master
Grovetown Post Office
101 Fornum Drive
Grovetown, Georgia 30813

Dear sir or madam:

I hereby request an address correction for the following address:

Mr. Allen L. Mosbaugh
1701 Kings Court
Grovetown, Georgia 30813

I enclose $3.00 cash.

Upon receipt of this letter, please call me collect at the above listed telephone number.

New address
2692 Boggs Rd
Amelia OH 45102

Very truly yours,

John Lamberski

John Lamberski

TROUTMAN SANDERS
ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

NATIONSBANK PLAZA
600 PEACHTREE STREET, N.E., SUITE 5200
ATLANTA, GEORGIA 30308-2216
TELEPHONE: 404-885-3000
FACSIMILE: 404-885-3900

JESSE P. SCHAUDIES, JR.

DIRECT: 404-885-3212

November 16, 1992

Michael D. Kohn, Esquire
Kohn, Kohn & Colapinto, P.C.
517 Florida Avenue, N.W.
Washington, D.C. 20001

Re: Mosbaugh v. Georgia Power Company
Case Nos. 91-ERA-1 and 91-ERA-11

Dear Michael:

Attached please find a note from the Office of the Administrative Law Judges in Ft. Lauderdale, Florida, asking me to forward the enclosed Order to Mr. Mosbaugh. Apparently, his original mailing was returned to the ALJ and his office did not have a correct address for Mr. Mosbaugh. However, I decided it would be best to just send this directly to you and avoid any direct contact with your client.

Very truly yours,

Jay

Jesse P. Schaudies, Jr.

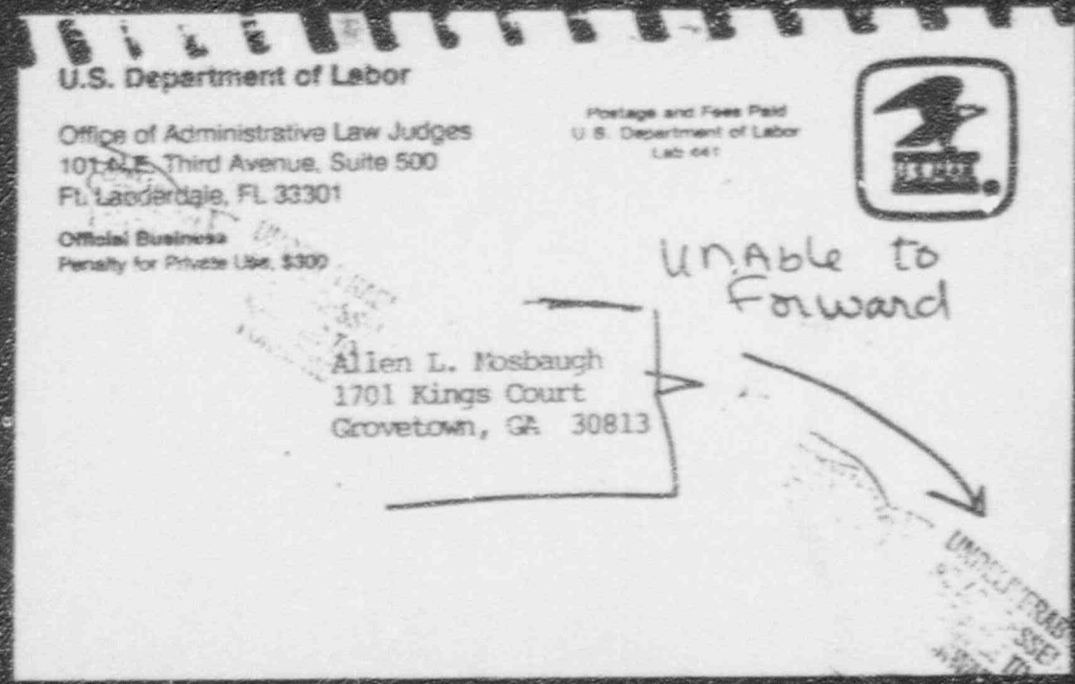
JPSJr./sme

Enclosure

Please forward to
Allen Mosbaugh, we
do not have a correct
address for him

Thanks

Jane Cranshaw
DOL/OALJ
Ft Lauderdale
Fl.



U.S. Department of Labor

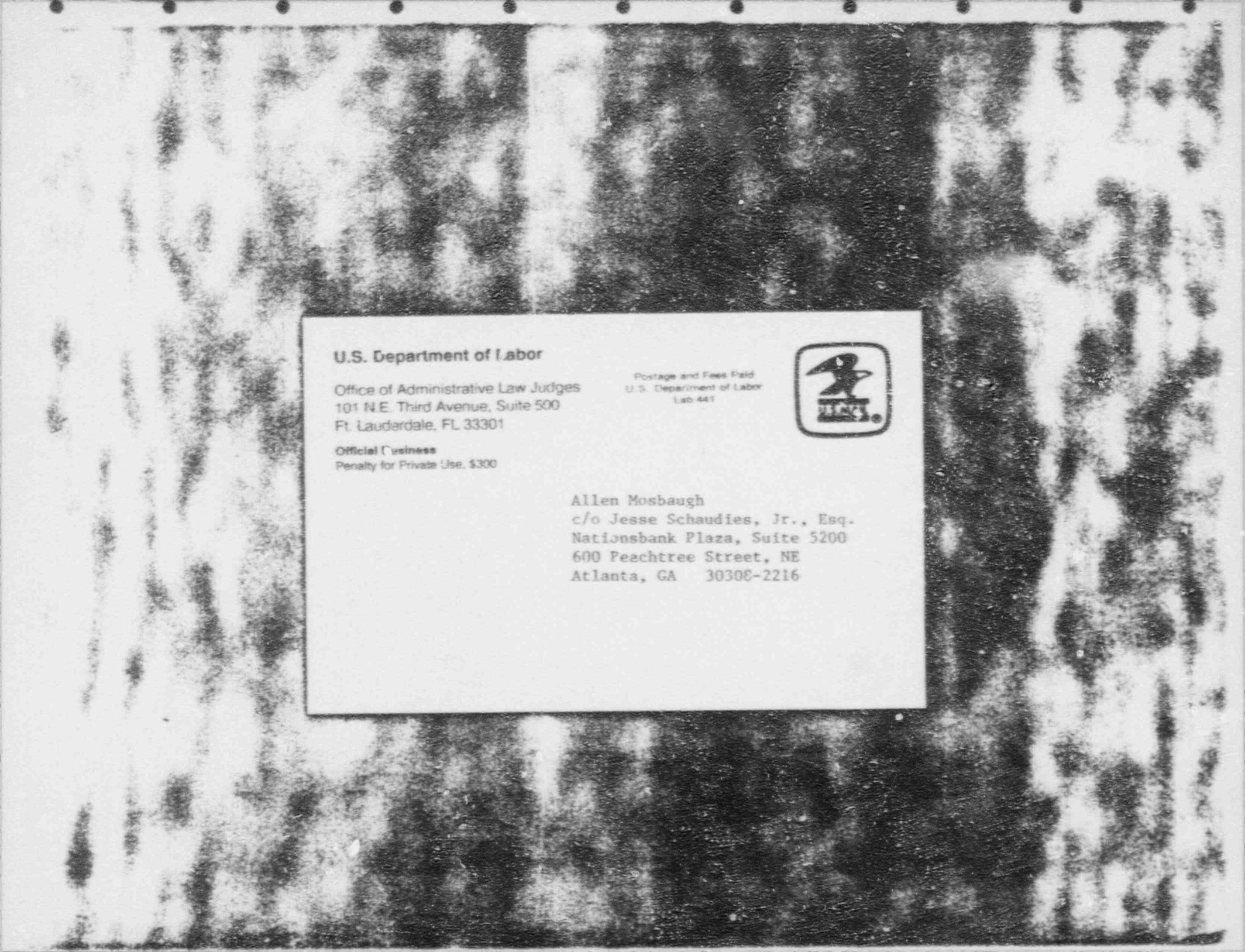
Office of Administrative Law Judges
101 N.E. Third Avenue, Suite 500
Ft. Lauderdale, FL 33301

Official Business
Penalty for Private Use, $300

Postage and Fees Paid
U.S. Department of Labor
Lab 441

UNABLE to Forward

Allen L. Mosbaugh
1701 Kings Court
Grovetown, GA 30813



U.S. Department of Labor

Office of Administrative Law Judges
101 N.E. Third Avenue, Suite 500
Ft. Lauderdale, FL 33301

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Penalty for Private Use, $300

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U.S. Department of Labor
Lab 441

Allen Mosbaugh
c/o Jesse Schaudies, Jr., Esq.
Nationsbank Plaza, Suite 5200
600 Peachtree Street, NE
Atlanta, GA 30308-2216

U.S. Department of Labor

Office of Administrative Law Judges
101 N.E. Third Avenue, Suite 500
Ft. Lauderdale, FL 33301

October 30, 1992

MEMORANDUM FOR: LYNN MARTIN
Secretary of Labor
U.S. Department of Labor
Room S-2018
200 Constitution Avenue, NW
Washington, DC 20210

FROM: ROBERT M. GLENNON
Administrative Law Judge

SUBJECT: ALLEN MOSBAUGH V. GEORGIA POWER COMPANY
Case Nos. 91-ERA-1
91-ERA-11

I transmit herewith my RECOMMENDED DECISION AND ORDER dated October 30, 1992, together with the record herein.

Enclosures:

U.S. Department of Labor

Office of Administrative Law Judges
101 N.E. Third Avenue, Suite 500
Ft. Lauderdale, FL 33301

DATE: October 30, 1992

CASE NOS. 91-ERA-1
91-ERA-11

In the Matter of:

ALLEN MOSBAUGH
Complainant

v.

GEORGIA POWER COMPANY
Respondent

Appearances:

Michael D. Kohn, Stephen M. Kohn,
and Sandra Michaels, Esq.
For the Complainant

James E. Joiner and Jesse P.
Schaudies, Esq.
For the Respondent

Daryl Shapiro, Esq.
For the Nuclear Regulatory Commission

Before: ROBERT M. GLENNON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

These proceedings arise under the Energy Reorganization Act of 1974, as amended, 4 U.S.C. 5801 et seq. ("ERA" or "the Act"), and its implementing regulations which are found at 29 CFR Part 24. The Act prohibits a covered employer from discriminating against an employee because that employee has engaged in activity protected by Section 5851 of the Act, 42 U.S.C. 5851. Employee complaints of prohibited discrimination under that law are adjudicated by the Secretary of Labor under procedures specified at 29 CFR 24.1 et seq.

Allen Mosbaugh, Complainant, was discharged from his employment with the Georgia Power Company, Respondent, on October 11, 1990. It is his contention in these proceedings that his discharge and other adverse actions taken by the company constituted retaliation for his having engaged in protected activity while he was its employee. The Georgia Power Company is a licensee of the Nuclear Regulatory Commission and is an employer subject to the employee protection provisions of Section 5851 of the Act.

1. Procedural Background. The events which are the subject of these proceedings have been the subject of three Section 5851 complaints. The first of those complaints was filed on June 4, 1990, and amended June 23, 1990. That complaint charged that Mr. Mosbaugh had been removed from certain positions and assignments within the company, transferred to unsuitable assignments, and otherwise adversely treated for engaging in specified acts of protected activity. After an administrative level investigation, the District Director of the Department of Labor's Wage and Hour Division ("District Director") advised Mosbaugh that unlawful discrimination had not been established. Mosbaugh's appeal of that determination was assigned as Case No. 90-ERA-58, and set in process for a de novo hearing by an administrative law judge. Extensive pre-trial discovery was the conducted by the parties, but, on February 19, 1991, Complainant filed a notice of voluntary dismissal of the complaint.

Mosbaugh had then filed a second Department of Labor ("DOL") complaint, dated August 20, 1991, asserting additional counts of discriminatory action, an alleged downgrading of Mosbaugh's performance evaluation and the taking away of his company car. In this instance also, the District Director investigated the complaint and determined, on September 21, 1990, that unlawful discrimination had not been established. Complainant's appeal of that determination, docketed as Case No. 91-ERA-1, is in issue in these proceedings before me.

Mosbaugh filed the third DOL Section 5851 complaint on September 19, 1991, amending it on October 17, 1990, asserting that he had been barred from the worksite on September 15, 1990, and then discharged on October 11, 1990, in violation of Section 5851. The District Director conducted an additional investigation following that complaint and issued a determination on November 16, 1990 finding that Mosbaugh had engaged in relevant protected activity, and that the Georgia Power Company had retaliated unlawfully. Georgia Power Company's appeal of that determination, docketed as Case No. 91-ERA-11, is in issue in these proceedings before me.

The complaints in Cases Nos. 91-ERA-1 and 91-ERA-11 were consolidated for hearing by order of Deputy Chief Judge Vittone on February 25, 1991. Following a series of telephone pre-trial conferences between the undersigned judge and the parties, Complainant moved, on May 16, 1991, for a summary judgement on the merits of the issue of liability. Complainant's Motion was supported by extensive supporting documentary evidence. Respondent replied to the Motion on July 26, 1991, with extensive assertions of fact, in affidavit and other form. Complaint's motion for summary judgement was denied by my order entered on August 9, 1991.

A second series of formal and informal pre-trial conferences took place thereafter, and the parties proceeded to conclude pre-trial discovery and exchange of documents. A formal hearing on the merits of the complaints was conducted on March 10, 11, 12, and 13, 1992 at Atlanta, Georgia. Post hearing briefs were filed by Complainant and by Respondent, and each party filed a reply brief. In the following recommended decision and order, these abbreviated references will be used: CX for Complaint's exhibits; RX for Respondent's exhibits; and TR for the transcript of the March 1992 hearing.

2. Mosbaugh's Audio Tapes as Evidence. A significantly complicating factor in the process of litigating these complaints has been the existence and control over 277 audio cassette tape recordings secretly, privately recorded by Mr. Mosbaugh between February and August 1991 at the workplace during his employment. As far as the Respondent is concerned, the existence of these tape recordings came to light on September 11, 1990 in the course of Respondent's deposition of Mosbaugh in preparation for trial in the first DOL complaint case, Case No. 90-ERA-58.

When Respondent Georgia Power Company demanded access to the audio tapes in Mosbaugh's possession at his September 11, 1990 deposition, as part of the pre-trial discovery process in Case No. 90-ERA-58, and after Judge Gilday on September 12, 1990 directed Mosbaugh to produce the tapes, counsel for Mosbaugh advised the Nuclear Regulatory Commission of the existence of the 277 tape recordings. On September 13, 1990, the Nuclear Regulatory Commission became an Intervening Party in Case No. 90-ERA-58 and moved for a suspension of discovery. In its September 13th Motion, the Nuclear Regulatory Commission stated:

> The Complainant has agreed to provide these recordings to the NRC in their entirety. The NRC will expeditiously review these materials and provide this Tribunal with a detailed statement describing the number and nature of the recordings, if any, which it wishes this Tribunal to protect from discovery. Accordingly, the NRC respectfully requests this Tribunal to stay any orders compelling discovery to the extent that the Complainant not be compelled to produce for discovery to Respondent various tape recordings of conversations regarding incidents involving the Vogtle Electric Power Station, owned by the Georgia Power Company.

Judge Gilday granted the NRC's request, and directed Mosbaugh to deliver all of the tape recordings to the NRC. Order, Judge Gilday, dated September 13, 1990, Case No. 90-ERA-58.

In February 1991, the NRC returned 201 of the 277 audio tapes to Mr. Mosbaugh, but retained possession of the other 76

tapes. On October 22, 1991, following a series of pre-trial conference discussions with Complainant and Respondent, the undersigned judge wrote to the Solicitor, Nuclear Regulatory Commission, formally inquiring about the status of the audio tapes in its possession. The Solicitor, on October 31, 1991, responded that the tapes were still being reviewed by the Commission.

In subsequent pre-trial conference with Complainant and Respondent, I directed the parties to complete preparations for trial on the assumption that the 76 audio tapes in the possession of the NRC would not be made available for discovery at trial. The parties were directed to complete any necessary discovery, with Complainant providing all of the tapes in his possession to the Respondent for copying. A period of time was provided for Respondent to copy and review the tapes, and the cases proceeded to trial in March 1992.

Respondent stated continuing objections to going forward with trial in these proceedings without having access to all of the audio tapes made by Mosbaugh. With the understanding that Complainant also did not have access to all of the tapes, I concluded that neither party would be unduly prejudiced by being required to go to trial without access to the 76 audio tapes retained by the NRC. I concluded that, were any real question of fairness or due process regarding these tapes to become evident during trial, that problem could then be addressed in specific terms. As will be evident in the discussion that follows, I conclude that access to the 76 tapes was not required for a fair and complete trial of the facts and issues in these proceedings.

3. The Factual Background. Allen Mosbaugh is highly educated and experienced in chemical and nuclear engineering. He has a Master of Science degree in chemical and nuclear engineering from the University of Cincinnati, and has completed the course work necessary for a doctorate in that field. His work in nuclear power plants began in 1974 with the Babcock & Wilcox Company. He later worked for 6 years in start-up and operation of a nuclear power plant for the Cincinnati Gas & Electric Company. In 1984 he was employed by Georgia Power Company as a superintendent of engineering liaison at its Vogtle Electric Generating Plant ("Plant Vogtle") during its construction and pre-operational stage. In this work he supervised a staff of about 30 engineers in performing pre-operational testing of the first of two nuclear reactors ("Unit 1") at Plant Vogtle.

In the summer of 1986 he was promoted to be superintendent of engineering services, and later that year to be assistant plant support manager for Plant Vogtle, supervising all engineering personnel, the quality control inspection staff, and plant security personnel. At this point, more than 400 employees

reported to Mosbaugh. That Mosbaugh did well in his work can be seen in the comments given in Mosbaugh's annual performance appraisal in December 1987 by Tom Greene, Plant Support Manager at Plant Vogtle. In the supervisor's comment item in the appraisal form regarding "future growth possibilities," Greene stated:

> With an SRO and improvements in his communications skills, Allen can progress to Plant Manager or Plant Support Manager. CX 6

The term SRO means "Senior Reactor Operator". A person is granted an SRO license upon completion of a special SRO schooling process that takes about 15 months. TR 80

In January 1989, following a reorganization, Mosbaugh's title was changed to engineering support manager, a promotion. Then, in March 1989, when Tom Greene was assigned to attend Georgia Power Company's SRO school, Mosbaugh was assigned to take over Greene's position on an acting basis. The official organization chart for Plant Vogtle during that time, dated October 10, 1989, showed the position as "Assistant General Manager Plant Support." The designation "A.L. Mosbaugh (Acting)" is shown for that position. CX 12 In this position in the Plant Vogtle scheme, Mosbaugh reported directly to the plant's General Manager, then George Bockhold. Mosbaugh continued in this position until early May 1990, when Tom Greene returned to Plant Vogtle from his SRO school assignment and reoccupied his prior position. Mosbaugh's assignments from that point on are discussed below.

The Georgia Power Company is a private, investor-owned electric utility. Together with several co-owners, it owns and operates two nuclear power plants, Plant Vogtle in Waynesboro, Georgia, and Plant Hatch in Baxley, Georgia. Georgia Power Company acts as the operator and licensee for both nuclear power plants. It is a wholly-owned subsidiary of The Southern Company, a public utility holding company that includes the Alabama Power, Mississippi Power and Savannah Electric Companies. In 1988 The Southern Company formed a new affiliate, Southern Nuclear Operating Company ("SONOPCO" or "Southern Nuclear") to reorganize and integrate the off-site management functions of Plant Vogtle, Plant Hatch, and Plant Farley, a nuclear power plant owned and operated by the Alabama Power Company in Dothan, Alabama. TR 88-100, Resp. Brief, p.8

Plant Vogtle is a nuclear generating station producing 1,100 megawatts of electrical power from each of two reactors. Georgia Power Company describes it as a very modern plant designed and constructed after the lessons of the Three Mile Island events, with close regulatory control being exercised over its operations by the Nuclear Regulatory Commission. The first of its reactors

went into commercial service in May 1987. Unit 2 did so in May 1989.

Beginning in June 1988, Plant Vogtle's General Manager Bockhold reported to an off-site corporate vice president, Ken McCoy, located at the SONOPCO headquarters in Birmingham, Alabama. McCoy, in turn, reported to a senior vice president, George Hairston, and an executive vice president, Pat McDonald, also at the SONOPCO headquarters. McDonald reported to Georgia Power Company president and chief operating officer A.W. Dahlberg, whose office is in Atlanta. Prior to 1988, Plant Vogtle's operations were supervised by corporate executives located in the Atlanta corporate headquarters. TR 101

4. Chronology of Mosbaugh's "Protected Activity". Beginning with the introduction of SONOPCO into the corporate reporting chain of command, Mosbaugh felt a change from a "conservative" to a more "risk-taking" attitude in decision-making in the operation of Plant Vogtle during refueling outages. He stated the following generalized comparison of those attitudes:

> Well, in the operation of the plant there's lots of manipulations that have to be done, there's lots and lots of redundant features, there's lots of requirements, and you always get to a point where your schedule may be banging up against the requirement, and the requirement may be stopping you from moving forward, and you may have to make some decisions, and sometimes those decisions are fairly black and white, and sometimes those decisions require some interpretation.
>
> Risk taking and nonconservative decision-making means that you may interpret those issues in your favor, in favor of schedule as opposed to safety, and of course if you go so far as to interpret those requirements in violation of the requirements so that the schedule can be met, you know, that's risk-taking at its worst because those requirements have been set up by the Nuclear Regulatory Commission to assure safety, they are part of the licensing and safety basis of the plant. They are the requirements that you have to operate to. TR 108, 109

Mosbaugh expressed a particular concern for strict observance of "reportability" requirements, a variety of requirements specified by the Nuclear Regulatory Commission in the Code of Federal Regulations ("CFR") for reporting operating events or security events related to plant safety. Mosbaugh stated:

> The reason why the NRC does that is they want to know what's going on at these nuclear power plants, and they

also have a whole division I believe in Washington which is called AEOD, they analyze operating events.

This is their data base for determining trends, for determining to some degree the performance of the plants. If a plant is making lots and lots of these reports that plant may be viewed as a problem. If it is not making any of these reports, it might more be considered to be a better, well-run plant. TR 110

On September 13, 1989, John Aufdenkampe, then the manager for technical support, who reported directly to Mosbaugh, brought a "reportability" concern to his attention. In reviewing certain documents for an analysis expected to be routine, Aufdenkampe's staff came upon what they believed was an "event" in October 1988 that should have been reported to the NRC, as a violation of the "Technical Specifications" ("Tech Specs") governing Plant Vogtle's operations. TR 111 The "Technical Specifications" are very specific rules governing the operation of a nuclear plant, such as Plant Vogtle, to which exact, verbatim compliance is required by the NRC. Mosbaugh told Aufdenkampe to raise the "reportability" concern at Plant Vogtle's "morning meeting" that day. The morning meeting was a routine daily conference of senior managers, sometimes including the NRC personnel, meeting to discuss overnight transactions and recent events. When Aufdenkampe did raise the issue, a manager from the "Operations" side of the conference table spoke up and said: "Watch what you're saying," in a loud, irritated, challenging voice. TR 119 Plant Manager Bockhold and the senior "Operations" manager, Skip Kitchens, were not at that meeting.

That afternoon, when Mosbaugh brought the matter to the attention of Bockhold, Bockhold called a meeting with his two senior managers for "Support" and "Operations," Mosbaugh and Kitchens. At that meeting, Kitchens said he believed no violation of the Tech Specs had occurred, but when Mosbaugh held to his position, Kitchens agreed to write a "deficiency card" which would bring the matter formally before the Plant Review Board ("PRB").

The PRB is a staff committee of senior department managers, or senior supervisory staff officials within the departments, established pursuant to certain provisions of the Tech Specs to review a wide range of issues arising at the plant, "to advise the General Manager ... on all matters related to nuclear safety." CX 13 The basic structure, procedures, responsibilities and record keeping rules are specified at Item 6.4.1 through Item 6.4.8, Administrative Controls, of the Tech Specs for Plant Vogtle. CX 13, TR 102 In mid-1989, the composition of the PRB was changed to place Vogtle's most experienced managers on the PRB, replacing supervisory level personnel who had been performing that function. TR 103

Kitchens, the plant's top manager for "Operations," was named PRB chairman, and Mosbaugh, the acting top manager for "Support," was named vice chairman.

The operational issue presented, when the "reportability" concern was raised, was whether certain "dilution valves" had been opened during a "mid-loop" interval during a nuclear refueling outage in October 1988. The Tech Specs prohibit opening those valves that allow demineralized water to flow into the reactor vessel's coolant during a "mid-loop" interval. The "mid-loop" is when the fission control rods have been fully employed in shutting down the nuclear reactor and when the coolant, augmented by boron which inhibits fission, is at about 1/3 the normal vessel volume. Since the control rods have already been fully employed in this situation, borated coolant is needed to prevent a fission reaction in the reactor vessel. Opening the "dilution valves," for the addition of other chemicals or any other purpose, can result in the addition of demineralized water to the borated coolant in the vessel, thereby diminishing the controlling capability of the borated coolant. Mosbaugh explains that the Tech Specs require the dilution valves to be locked shut at all times during the "mid-loop" interval because the nuclear containment vessel is in a vulnerable, "breached" condition during a refueling outage. Mosbaugh believed that the opening of these valves at "mid-loop" in order to add additional chemicals, as had been done in the October 1988 refueling outage, had put the plant in an "unanalyzed" and therefore unsafe condition. The condition was "unanalyzed," Mosbaugh contended, because there had been no formal technical analysis previously completed to show what reactions could occur within the reactor vessel under these conditions. Tr 114-9, CX 15

On September 15, 1989, two days after the meeting with Bockhold and Mosbaugh, Kitchens sent a memorandum to Bockhold stating his position that no violation of the Tech Specs had occurred, asserting, in part, that the reactor coolant system had not been at the "mid-loop" condition when the dilution valves were opened. CX 14 It was clear at this time that the dilution valves had been opened during a particular interval in the 1988 outage for the addition of hydrogen peroxide, and that unborated water had flowed into the reactor vessel. It was also clear that, if the event constituted a violation of the Tech Specs, the event should have been reported to the NRC. Mosbaugh believed that Kitchens' September 15, 1989 memorandum was "false" in asserting that the coolant in the reactor vessel had not been at the "mid-loop" condition when the hydrogen peroxide was added, because he had reviewed the control logs. TR 125 He testified:

> ...I continued to gather the facts on what had happened, and so I got control logs and shift supervisor logs and so forth out of the main control

room, and I reviewed back to the 1988 period when this had happened, and it was clearly marked what the reactor coolant system levels were, and what I found out is these valves had been opened on four different occasions.

The first two occasions that they had been opened on. the reactor coolant system was not technically at mid-loop. On the second two occasions that they had been opened, the reactor coolant system was at mid-loop as indicated by log entries in the main control room log. TR 123

At about this time, Mosbaugh heard rumors that the operations staff had refused to open the dilution values during the interval in issue, that they had been overruled by their management, and that Skip Kitchens himself had opened the valves. TR 126

The Plant Review Board proceeded to consider this "dilution valve" incident in the course of several meetings between September 13 and late October 1989. The sessions included a confrontation between Mosbaugh and Kitchens about whether the vessel had been at "mid-loop." It was concluded, initially, that the matter should be referred to the outside contractor, Westinghouse Company, for a technical analysis, as well to SONOPCO headquarters in Birmingham for an interpretation. When the responses came back to the PRB, with SONOPCO presenting an ambiguous answer and Westinghouse concluding that the event would not have gone beyond the control of the operators at the site, the PRB decided that since the Tech Specs had not been violated and there had been no safety threat, no NRC report was required. TR 131 Mosbaugh concurred in that decision of the PRB at that time. TR 131

After the PRB vote, Mosbaugh continued to review the documents and reexamine the concepts behind the NRC's reporting requirements. He eventually concluded, at about the beginning of December 1989, that he had been wrong to rely on the SONOPCO interpretation and that a violation of the Tech Specs had occurred in the October 1988 outage. At about that time, he also had a "flashing" recollection of a meeting in late 1988 in which he believed he heard Skip Kitchens say he had "used his SRO license" that day. Mosbaugh now believed that the recalled comment was proof that Kitchens had deliberately violated the Tech Specs in the October 1988 outage. Mosbaugh stated:

...with that it occurred to me that what I had heard was true, it fit together, and that Skip had opened these valves, or authorized or ordered the opening of these valves, and we had a tech spec violation, but now it appeared that this tech spec violation was

> intentionally violated, and so the nature of my concern changed to that of a tech spec violation and just being reportable to an intentional violation of technical specifications which is criminal conduct. TR 137

This was the first time in his career that Mosbaugh had "firsthand evidence" of a willful violation of technical specifications, and he had never before been an "alleger" of such conduct to the NRC. TR 139 Over the next several weeks in December 1989, Mosbaugh drafted a detailed summary of his evidence of the violation, telling no one about it but his wife. When the document was completed, he mailed it to the NRC anonymously, taking very special precautions to avoid having the document traced back to him. TR 142, CX 15 He believes he mailed it on January 7, 1990. He later learned that the NRC had logged it as received on January 9, 1990.

NRC staff proceeded with a prompt on-site investigation of the October 1988 valve incident, questioning people at Plant Vogtle and gathering relevant documents. TR 150 Mosbaugh believed that management's attitude toward him became changed after this time, and he feared that his position in the company was threatened. It was in the succeeding weeks that Mosbaugh would decide to begin tape recording conversations on the job at Plant Vogtle.

Mosbaugh was called to a meeting with Bockhold and Kitchens in mid-to-late January 1990, probably on January 19th, to discuss such things as teamwork, personal faults, "backstabbing," etc. Some days later, on January 29th, Bockhold came to Mosbaugh's office and discussed the NRC investigation in a manner that Mosbaugh believed showed Mosbaugh was suspected of being the "alleger" to the NRC. TR 158 On February 7, in a meeting with Bockhold to discuss the approaching reorganization at Plant Vogtle, Mosbaugh noted Bockhold as emphasizing "conforming" in the company, or else, "you need to get out." TR 162 There also was more discussion of the NRC investigation, with Bockhold stating that when the PRB members were to be interviewed by the NRC they could choose to be represented by the company attorney. It was understood that the investigation was being done by the NRC's Office of Investigations ("NRC-OI"), an office that normally investigates the more serious, possibly criminal violations. TR 156 Later that day, Mosbaugh overheard Bockhold talking to McCoy on the telephone saying that "Allen and the other managers" were to be interviewed by the NRC. It seemed strange to Mosbaugh, and it concerned him, that his name was singled out in this context, since he had played no role in the October 1988 dilution valve incident itself. TR 165

When Mosbaugh went to his NRC interview on February 8, 1990, he decided to have the company attorney appear there with him as his attorney. He feared that doing otherwise would make him

stand out too conspicuously in these circumstances. TR 166 In general, he felt intimidated by the attorney's presence at the interview, but did reveal to the investigators rumors about the 1988 incident he felt were significant. TR 170 At the NRC interview, he did name 2 individuals from whom he had heard rumors: (1) a rumor that some "operations" staff personnel had not agreed with the decision to open the dilution valves, and (2) a rumor that it was Skip Kitchens who had opened the valves. He did not -- on the advice of the company counsel, as he recalls it -- tell them he had recalled hearing Kitchens talk about "using his SRO license" at that time. TR 169 Later, in May 1990, after Mosbaugh had contacted Attorney Michael Cohn in these matters, Mosbaugh prepared a memorandum that Attorney Cohn delivered to the NRC-OI investigator in June 1990, stating that, on advice of the company counsel, he had neglected in that interview to mention his hearing Skip Kitchens say he had "used his SRO license" at about the time of the dilution valve incident. TR 171, CX 46

In the early months of 1990, Mosbaugh also was vigorously presenting opposition within the company at Plant Vogtle against putting into service a special experimental filtration device, the FAVA filter, named for its vendor, George Fava. In early 1989, the quality assurance staff had caused it to be removed from service at Plant Vogtle because its construction did not meet NRC standards and had been improperly procured. TR 176 In late 1989 and early 1990, the operations side of Plant Vogtle pushed to have the PRB approve its use. Mosbaugh carefully reviewed the proposal and, based on his findings and his familiarity with the design, testing components, etc., strongly opposed its use at Plant Vogtle. TR 177 On February 9, 1990, the PRB voted, 6 to 1 against Mosbaugh's position. TR 179 He was upset by that result. He testified:

> I was appalled, I was disgusted -- as a nuclear professional I was disgusted and appalled, and I was a little shocked that some of the people that I thought knew better and had talked to me on the side that they knew that this was in violation, I was surprised that they had voted in favor of it. TR 181

A week later, Mosbaugh filed a formal "Quality Concern" about the PRB decision with the Plant Vogtle Quality Concerns Coordinator, Bill Lyons. CX 22 This memo to Lyons was a detailed, 15-page memorandum discussing the evaluation of the issue. Mosbaugh later supplemented that memorandum in other detailed and documented memoranda dated March 16, June 1, and June 11, 1990. CX 23,24

A few days after Mosbaugh's first FAVA memorandum to him, Lyons, appearing "somewhat upset," told Mosbaugh that Bockhold had taken the matter from Lyons and would handle it himself. TR

182 This fact, in context with other matters taking place, such as the NRC-OI investigation, made Mosbaugh feel an atmosphere of intimidation affecting others as well as himself. TR 184 He felt there was an atmosphere in which employees at Plant Vogtle felt intimidated and feared retribution for giving opinions contrary to management pressure. TR 188 On February 20, 1990, Bockhold directed that the FAVA unit be kept out of service, and directed Mosbaugh personally to continue the investigation of the matter. Later a corporate engineering audit manager was assigned to work with Mosbaugh on this issue. TR 648, DX 71 The NRC eventually was told about the matter and was asked for its evaluation. It did review the data related to use of the FAVA filter, and advised McCoy it had no objection to its use as proposed. TR 541 Thereafter, use of the FAVA filter, with modifications, was approved by the PRB at a scheduled meeting with FAVA on its agenda. Mosbaugh did not attend that meeting of the PRB because of a family matter needing his attention at the scheduled time. TR 650

Mosbaugh filed two additional anonymous charges with the NRC in late February and early March 1990, CX 35, 36, concerning what he believed were additional safety violations by Plant Vogtle management, violations showing what he believed were "blatant disregard" for compliance with governing safety requirements regulated by the NRC. TR 219 - 222

In the aftermath of a March 20, 1990 "Site Area Emergency" at Plant Vogtle, Mosbaugh became appalled and disgusted when a SRO-licensed supervisor spoke to a staff meeting seemingly suggesting intentional violations of the Tech Specs if necessary to conclude a refueling outage more promptly. TR 214 At the time, Mosbaugh was the late-night plant duty manager, and he heard the supervisor speak to the staff. Mosbaugh testified:

> And in this meeting the shift supervisor -- this is the SRO-licensed person on shift responsible for control room operations addressing a group of around twenty people that would be working for him from various departments for the night, for the evening shift, he said to that audience, he said: "We've got a lot of work to do," he said, "It can be done if you take the LERs" and then there was laughter.
>
> Now my interpretation of what "take the LERs" is, an LER is the 30-day report that you have to file with the NRC after you violate a tech spec, so he meant that we could meet the schedule, get on with the outage, if we could violate tech specs and then just write the 30-day reports.
> TR 213

Mosbaugh jotted down the quotation on an envelope and then, feeling that his note on an envelope was meager documentation for a serious problem, he decided to intensify his secret tape recording activity. TR 213

The March 20, 1990 emergency began with a delivery tank truck crashing into an electric utility pole at the plant site, causing loss of all electrical power from off-site sources. Normally, the plant has 4 independent sources of electrical power, 2 off-site and 2 on-site. However, two of those sources, one off-site and the other on-site, were inoperative, being serviced. When the truck crash occurred, only one on-site power source remained, a large diesel generator. An additional complicating factor was that the Unit 1 reactor was undergoing a refueling outage. The operative on-site diesel generator did not function properly. As Mosbaugh described it:

> The diesel started and it ran for approximately a minute and twenty seconds, and then it tripped off line. At that point the containment was open, the reactor vessel was breached, and the station was in a total blackout, no electrical power safety-related of any kind.
>
> The coolant in the reactor vessel began to heat up, and the diesel was attempted to be restarted again. It started and again ran for a brief period of time and then tripped again, and the blackout continued for approximately 36 minutes until they were able to get the diesel started and get it to continue running. TR 208

Mosbaugh believed that had the electrical blackout continued for some period of time, a catastrophic nuclear accident could have occurred. TR 210

Following the March 20, 1990 Site Area Emergency, Georgia Power Company was required by the Nuclear Regulatory Commission to submit a formal Confirmation of Action Letter ("COAL") to describe its corrective actions in justification for permission to return the Unit 1 reactor to power operation. On April 9, 1990, SONOPCO senior vice president Hairston submitted that COAL to the NRC. CX 40 Mosbaugh obtained a copy of the COAL the next day, and concluded that 2 sections of the letter contained false statements, statements regarding the results of start-up testing of the on-site back-up diesel generators following the March 20 event, and statements regarding the monitored dew point air quality in the generators' air systems. TR 258

Although the COAL stated that, since the March 20 event, the generators had been test-started 18 times and 19 times, respectively, without failures or problems, Mosbaugh believed

there had been problems and failures, and he knew that the reliability of these generators was a crucial consideration in deciding whether Unit 1 should be returned to power operation. TR 259 He also knew there had historically been problems controlling the dew point in the air system for the diesel generators. TR 261 On April 10, 1990, Mosbaugh sent a memorandum, with supporting data from an engineer, to Bockhold describing the problems that had been encountered with the diesels' air quality system. TR 263, CX 41 In addition, Mosbaugh then proceeded to obtain data from the control room regarding the diesels' start-up testing referred to in the COAL. When he had compiled the data and reviewed it, he believed that the post-March 20 testing had shown failures and problems. He reported those findings to his management that the COAL had contained "incorrect" and "false" statements. He testified:

> With regard to my concerns about this statement being false about the starts, I raised it, I personally raised it to responsible and high-level management informing them that I thought it was incorrect, that it was false. TR 276

Nevertheless, on April 19, 1990, the Licensee Event Report ("LER") sent to the NRC by SONOPCO's Hairston regarding the March 20 emergency, a report specifically required within 30 days by standing, codified regulations (10 CFR 50.73), repeated the incorrect post-March 20 generator start-up test results. CX 42 Mosbaugh had reviewed drafts of the LER and had reported the incorrect data to management. He testified:

> Q. When you noticed that in the draft LER, did you report that to anyone at Georgia Power?
>
> A. Yes, I did. That was what, you know, I had mentioned before. Yes, I reported this to senior and responsible management that this information was false, and this information was materially false.
>
> Q. Now, did you make that report to the best of your knowledge before or after Mr. Hairston signed this document?
>
> A. I absolutely reported it to them before this document was signed.
> TR 269

When Mosbaugh later saw the LER actually sent to the NRC, he felt concerned because. "It had been signed out false." TR 270 He sent another memorandum to Bockhold, dated April 30, 1990, enclosing a tabulation of the actual results from the data he had gathered. CX 43 He then proceeded to work with his staff in drafting a revision correcting the test data statement and, on May 8, 1990, the PRB approved the revised LER to the NRC

correcting the prior version as proposed by Mosbaugh and his staff. TR 273

Other things were happening during April and May 1990 that bothered Mosbaugh concerning his position in the company. On April 27, 1990, he was called at work by Tom Greene, who was then at home. Greene wanted a meeting, as Mosbaugh stated it, to discuss Mosbaugh's "turning over my job responsibilities" to Greene. This was, Mosbaugh stated:

> ...the first I knew that any decisions had been made, and my supervisor George Bockhold wasn't communicating with me about it, I was finding out by accident from Tom Greene.
>
> Tom Greene was surprised too. Tom Greene said, you know, like "George hasn't talked to you?" and then he says "Well, you need to go talk to George," and he also indicated that George had been talking to other people about it. My interpretation was he meant other people than the conversation between Greene and Bockhold. TR 279

At a PRB meeting on May 10, two days after the PRB had approved the corrected LER, Mosbaugh, then vice-chairman of the PRB and acting as chairman of the meeting, initiated an action to correct the prior COAL sent to the NRC regarding the March 20 emergency event. Mosbaugh testified:

> I was acting as the chairman of the PRB in my vice chairman capacity, and so I initiated an action item as PRB chairman to Mr. Bockhold to determine how the COA letter was, the false information in the COA letter was to be corrected as well, and so I think on May 10, the PRB issued an action item to Bockhold to correct the COA. TR 280

The next day, May 11, Mosbaugh received a copy of a memorandum dated May 10 from Bockhold to all department managers at Plant Vogtle, advising that Tom Greene had been designated a member and vice chairman of the PRB, relieving Mosbaugh, effective May 11. TR 280, CX 44 Mosbaugh believed he should have been retained on the PRB, even with Greene's return to Plant Vogtle from SRO school, that his participation could have been used in a wide variety of areas on the PRB. He felt as though he had been placed in a "limbo" status. TR 282

On May 8th, SONOPCO's McCoy had come to Mosbaugh's office, discussing the prospects of a job opportunity outside Georgia Power Company. Mosbaugh described the discussion:

... he came in and said that Mr. Hairston had made some statement to him and that up at TVA there is a man up there by the name of Oliver Kingsley who used to be a Southern Company employee, that Mr. Kingsley was looking for some good managers, good experienced managers to come up to TVA and work at Watts Bar, and Mr. Hairston had mentioned this to Mr. McCoy, and Mr. McCoy was coming to me and wanting to know if he could grease the skids for me to leave my employment with Georgia Power and hire on with TVA. TR 273

This was the first time Mosbaugh had had a manager in his own employer organization "try to offer me employment at a competitor's company or plant." TR 274

Earlier in the day, on May 8th, Mosbaugh had been in a meeting with other managers at Plant Vogtle when he recalled McCoy's telling the group that he and the other SONOPCO vice presidents had been called to Washington by the NRC and, as Mosbaugh recalled:

...they had in Mr. McCoy's words been taken out back to the woodshed...in this meeting the NRC had said that Vogtle was cowboy, and cavalier and cocky, we didn't follow procedure, and lots of negative things... TR 274, 275

Mosbaugh filed his first whistleblower complaint with the Department of Labor, because of his removal from the PRB, on June 6, 1990, and a week later signed a "confidentiality agreement" with the NRC investigator dealing with Plant Vogtle issues, Larry Robinson. TR 286, CX 45 Thereafter, over the course of several months, Mosbaugh met with Robinson on 4 occasions in the evening for 4 or 5 hours to discuss these issues, giving sworn testimony on 2 of those occasions. TR 287 They also had telephone discussions once or twice a week over the course of the summer. During these meetings, Mosbaugh presented a number of very detailed written allegations, with documents, regarding violations he had noted in the prior several months of his work at Plant Vogtle. He did not at these meetings disclose to Robinson that he had been secretly recording conversations at the plant. Mosbaugh testified that he was fearful that word would get out, and that his gathering of documentation of his allegations could be stopped. He continued with his audio tape recording activities during this period. TR 289, 290

On June 19, Bockhold had a meeting with Mosbaugh together with on-site resident NRC inspector John Rogge. TR 412 Bockhold stated that in light of the DOL complaint he wanted to know all of Mosbaugh's quality concerns. It was agreed that Mosbaugh would detail his concerns to Lee Glenn, the Atlanta corporate level manager for "quality concerns," whose job was to

deal with the broader issues any employee in the company might raise. TR 292, 413 Mosbaugh then did meet with Glenn over the next few weeks, meeting on at least 2 occasions, TR 413, telling him about the problems and issues he had dealt with in the prior months. Glenn took extensive notes. When pressed, Glenn told Mosbaugh his data would be sent to the law firm representing Georgia Power in the whistleblower complaint case. TR 294

On July 6, 1990, Mosbaugh received a memorandum from Bockhold discussing the need for Mosbaugh to tell either the company or the NRC about his safety concerns. Mosbaugh regarded the memorandum as threatening. Mosbaugh replied with a memorandum dated July 13, 1990. TR 296, CX 47 Mosbaugh's memorandum, in essence, stated (1) that he had theretofore always stated his safety concerns through normal channels; (2) that the company had not responded to those concerns with timely and appropriate corrective actions; (3) that the company instead had taken adverse employment actions against him; (4) that internal processes to deal with his safety concerns had not been effective; (5) that he therefore was working with the NRC to pursue his concerns; and (6) that:

> Under no circumstance do I intend to disobey a direct order from my supervision. If you have any problem with my working with the NRC or would like me to do otherwise, please let me know.
> CX 47

At some point after he gave sworn confidential testimony to the NRC about his allegations in mid-July 1990, Mosbaugh learned that a special operational safety inspection ("OSI") would be conducted by the NRC. Subsequently, in August 1990, a team of NRC inspectors conducted a 2-week inspection at Plant Vogtle. Mosbaugh believed that Georgia Power suspected Mosbaugh was responsible for causing the OSI investigation. TR 298 Among other things, Mosbaugh was not invited to a meeting of the Plant Vogtle managers planning preparation for the inspection. TR 298 At another meeting during this period of time, Mosbaugh heard, he testified, McCoy state, "The OSI is here, the inspection is here because of some immature behavior on the part of an employee or employee alleger." Mosbaugh said he knew McCoy was talking about Mosbaugh. TR 299 At the OSI's exit interview following its inspection, Mosbaugh observed SONOPCO's vice president McDonald speak up, showing an "upset" demeanor because an issue of accuracy of information was raised at that interview. TR 301

On August 9, 1990, Bockhold gave Mosbaugh a part-year performance appraisal for the first and second quarters of 1990. CX 48 He was given a "Level 3" overall rating, an "average kind of rating," lower than any other Mosbaugh had received during his employment at Georgia Power. TR 301

After the NRC's OSI team of inspectors left Plant Vogtle, Mosbaugh was asked by the NRC's Robinson to "wear a wire" for the NRC at work. Mosbaugh considered doing so, but eventually declined. He also did not tell Robinson at this time that he had secretly recorded conversations over the previous months at the plant. TR 304

On September 11, 1990, Mosbaugh joined a former co-employee of the Georgia Power Company, Marvin B. Hobby, as petitioners to the Chairman of the NRC. CX 49 The petition requested initiation of licensing proceedings by the NRC to impose civil penalties upon the Georgia Power Company for illegal transfer of control of its operating licenses to SONOPCO, and for unsafe and improper operation of its licensed facilities. CX 49 Mosbaugh had been working in the preparation of that petition with his attorney, and with Hobby, since may 1990. TR 305, Mosbaugh Brief, p. 55

5. GPC Management's Treatment of Mosbaugh. Mosbaugh's earliest perception of overt hostility and suspicion for his whistleblowing arose from several encounters in late January and early February 1990, particularly the "teamwork" meeting with Bockhold, several passing comments made by Bockhold during those weeks, and his discussions with Bockhold about his future in the company during the February performance evaluation. Mosbaugh was worried about his position in the company. He had secretly mailed his whistleblowing allegations to the NRC in early January; the NRC investigators were proceeding with an investigation of the October 1988 dilution valve event he and his "Operations" staff had insistently brought to light a few months earlier; and he was concerned that he was suspected of being the NRC alleger. Although Mosbaugh had eventually joined in the PRB vote that the October 1988 event was not "reportable" to the NRC, it clearly had been at Mosbaugh's insistence that the PRB had to face the issue directly. TR 129

George Bockhold testified at the hearing that he did not know or suspect in January or February 1990 that Mosbaugh was the anonymous NRC alleger who caused the NRC-OI investigation at that time (TR 642), and generally that Mosbaugh's concerns about retaliation had not been well founded. During all of the time in issue in these proceedings, Bockhold was the senior on-site manager at Plant Vogtle. TR 632

As far as the October dilution valve event itself was concerned, the issue being investigated in January - February 1990 by the NRC-OI, Bockhold testified that he believed Mosbaugh had voted with the PRB on that issue and that that was his final action in that regard. TR 646 He recalls asking people at the plant about the source of the allegation, not to uncover the individual personally, but in order to talk to supervisors to improve communications at the plant. TR 645 He suspected that

the allegation had come from engineering, that is, the "Support" department staff managed by Mosbaugh at that time. TR 691

Bockhold testified that the "teamwork" meeting with Mosbaugh and Kitchens in January 1990 was nothing more than it purported to be. TR 640 His immediate corporate supervisor, McCoy, had expressed a need for improved teamwork between Mosbaugh and Kitchens and their respective staffs in December or January. Bockhold testified:

> I spoke to them in a team-building session, I believe it was in January of 1990, and at that time I started out with "Gee, we've got to work on teamwork, and I have some faults," and wrote some faults on the blackboard, and then asked them to identify their faults, and we had a team-building session to go over our faults and figure out how we were going to better communicate and work together to improve efficiency and solve plant problems and make progress at Plant Vogtle. TR 640

He did not "single out" either of them in this meeting, and each of them received a notation in their upcoming annual evaluations that "peaceful coexistence" between them was not good enough. TR 640

Several weeks later, in February, Bockhold let it be known at Plant Vogtle that the decision had been reached to move to a "1050 organization" for Plant Vogtle. TR 643 Plant employees were formally told on February 3, 1990 that the target organization for Plant Vogtle, to be implemented in the coming months of 1990, would have a total employee staff of 1,050 employees. TR 643, RX 62 The reorganization was a "downsizing" designed to increase operating efficiency for the plant. The then current level of permanent employees was approximately 1,280 people. TR 643 Bockhold made an effort to deal with staff members' concerns that they would lose their jobs, by announcing that while job levels would be changed, to higher or lower levels, existing salary levels would not be reduced and staff reductions would be made by normal attrition.

Bockhold believed that Mosbaugh had known for a long time that this post-construction/start-up reorganization would take place, and that his position managing the "Operations" department was held in an "acting" status only. Bockhold testified:

> As early as 1988 Ken McCoy and I had a conversation with Allen Mosbaugh about, you know, what would happen associated with reorganization.
>
> In fact, we offered him a job in Birmingham, and he declined because he said he did not want to move, and

> he said when the reorganization happened at the plant site he would be willing to basically take his chances with the other people to find out what type of job he would have. TR 644

Bockhold pointed out that Mosbaugh had reported to Tom Greene at the time Greene was sent to the SRO school in early 1989. At that time, when Mosbaugh took Greene's position on an "acting" basis, Bockhold testified:

> My expectations were that Mr. Greene would be successful in his SRO licensing program, he would come back and replace Allen who was acting for him, and in all probability at that time if Allen was willing to make a commitment to stay with the company we would send him to SRO school. TR 655

From prior conversations with Mosbaugh some 2 years earlier, Bockhold had concern that Mosbaugh was considering retiring early, possibly in 3 years or so. Bockhold stated:

> ... I had a basic concern because we spent basically a quarter of a million dollars, $250,000 or so to send a person through SRO school, and if you invest that kind of money you want to get some return on it, and although we don't ask people to sign contracts we are interested in their motivation. TR 656

That theme, a consideration of Mosbaugh's options in the company focusing on SRO school, was continued in discussions in April 1990 when Mosbaugh learned Greene was coming back and would take over the work Mosbaugh had been doing. At that time, Bockhold asked Mosbaugh for his preferences in assignments, bearing in mind the new "1050" organizational structure being implemented. Several days later Mosbaugh gave Bockhold his list which included the SRO school. When he was given the list, Bockhold testified:

> I also asked him after this whether he wanted to apply for another corporate position that I had heard about, and he once again said he wanted to stay at the plant, wanted to stay in the Augusta area. TR 658

Bockhold testified, essentially, that he believed Mosbaugh's options at this time, with the return of Greene from SRO school, were either to take a demotion in position at Plant Vogtle, to go to SRO school, or to relocate to another career opportunity outside Plant Vogtle. TR 659

On May 7, 1990, Bockhold announced at a staff meeting that Tom Greene "was coming back to his position," and congratulated Mosbaugh for a good job in Greene's absence. He also announced

that Mosbaugh then would be reporting directly to Bockhold for his assignments. TR 660

With respect to the FAVA filtration system, which had been a major concern of Mosbaugh, as discussed above, and which became the subject of another allegation of impropriety filed by Mosbaugh with the NRC, Bockhold testified that he regarded the matter only as a professional difference of opinion, that the matter was handled by GPC in a professional manner, and that Mosbaugh's involvement in the matter did not upset him. TR 650

Bockhold presented an entirely different perspective and description of the FAVA matter from that presented by Mosbaugh. In Bockhold's view, use of the FAVA filter at Plant Vogtle would serve a desirable objective, removal of radioactive contamination in water discharged into the Savannah River, with the installation done in a way that would resolve Mosbaugh's concerns. After Mosbaugh voted against use of the filter at the February 8 PRB meeting, Bockhold discussed the issue with McCoy and decided to deal with his concerns. He testified:

> ... we decided not to allow the system to be placed into operation until we could go ahead and review his concerns. We ended up assigning Paul Rushton at that time to investigate and work with Allen. In fact, for a period of time I told him [Mosbaugh, TR 649] to spend I think 50 percent of his time working on that concern to get it resolved. We involved the NRC residents, we involved the NRC regional folks.
>
> Finally we could not resolve the concern fully with Allen, but the NRC had no problem with putting it in service. In fact, they basically agreed with us that it would reduce environmental contamination, and so we did place it in service for a period of time. TR 647, 648, DX 71

Rushton was a corporate manager responsible for the engineering audit section. TR 648 Bockhold testified that he brought Rushton into this matter to provide independent engineering help on the issue. He did so, he testified, because Bill Lyons had trouble with the assignment. Bockhold testified:

> Bill Lyons worked directly for Allen Mosbaugh. Bill was concerned about the fact that Allen had submitted this quality concern, and he was reporting to the person that submitted this quality concern, and he couldn't effectively resolve it because he had a majority of the plant managers voting to activate the system to prevent environmental releases, and he had his immediate supervisor having an opposite opinion, so when Bill expressed that concern I said "I'll take care

of that concern," and the way I took care of the concern is really I got an independent person who was not involved in the meeting, not involved in the FAVA filter, who could really get the engineering support from corporate involved to resolve the issue. TR 650

Ultimately, Bockhold stated, it was "fine" that Mosbaugh disagreed, "We could disagree, but we felt we had covered all our bases and provided appropriate information, and even had NRC support to put his unit into service." The FAVA filter was put into a concrete vault, Bockhold stated, so that any potential leakage from the filter would be contained. TR 651

With respect to Mosbaugh's treatment in the company after April 1990, Bockhold testified that there was nothing improper about replacing Mosbaugh with Greene on the PRB. Since Green had resumed his position as manager of the support department on return from SRO school, it was consistent with the 1989 reconfiguration of the PRB to place him as vice chairman of the PRB. Moreover, since Mosbaugh would no longer have line manager responsibilities at Plant Vogtle while his future assignment was being considered, Bockhold decided to give him special assignments and not to place him on the PRB as an alternate member. TR 661 - 664 Bockhold testified that Mosbaugh's removal from the PRB was due to management organizational factors, and was unrelated to Mosbaugh's conduct on the FAVA filter issue. TR 661 Bockhold testified that the special assignments he then gave to Mosbaugh were "important jobs associated with key plant issues," and he described several of those jobs in detail. TR 662 - 664

After Mosbaugh filed his first DOL complaint in early June 1990, Bockhold told Mosbaugh to identify the specific problems he was concerned about, and he arranged with McCoy to have Leo Glenn, the corporate level "quality concerns" manager, to work with Mosbaugh in that process. On July 6, Bockhold sent a memorandum to Mosbaugh discussing the matter formally, after Mosbaugh had said he had additional concerns he would only discuss with the NRC. DX 44 There, Bockhold directed Mosbaugh to "immediately notify the NRC of any legitimate concerns that you may not have identified to us."

On August 13, 1990, Bockhold sent a memorandum to Mosbaugh, announcing that he had been reassigned, effective September 8, to attend the SRO school. With this assignment, the notice stated, Mosbaugh would receive a $200.00 monthly bonus, but that he would not be eligible to keep his company car in his new SRO training classification. DX 32

Bockhold first learned that Mosbaugh had been tape recording conversations at Plant Vogtle on September 12, 1990, the day he was being deposed by an attorney for Mosbaugh in preparation for

trial for the first of Mosbaugh's DOL complaints. He discussed that matter with McCoy the next day. He testified:

> I got a phone call from him the next day, I think it was in the evening, and then on Saturday morning I got a phone call from him, I was out at the plant, and basically he had decided to put Allen Mosbaugh on administrative leave, and I read to Allen the statement that Ken had directed me to read to him. TR 676

Bockhold did not otherwise discuss the taping matter with any employees until early in the following week when he told about it at a staff meeting. On September 19th, Bockhold made a general announcement to all employees, stating that the company had learned Mosbaugh had taped conversations with a large number of employees over an extended period of time, and that he had been placed on administrative leave for 30 days. DX 22, TR 679

Bockhold did not participate in the decisions to put Mosbaugh on administrative leave and then to discharge him, other than to tell McCoy of his own negative reaction and that of members of his staff. TR 677

C. K. McCoy testified at the hearing. He is a vice president of both Georgia Power Company and SONOPCO, and he is responsible for the operation of Plant Vogtle. McCoy joined the Georgia Power Company in June 1988. One of his first acts was to visit Plant Vogtle to introduce himself personally to the top level managers there. He recalls that in his first meeting with Mosbaugh they discussed their similar "early retirement" objectives. Mosbaugh discussed a small farm he had near Cincinnati that he would like to "go back to." This discussion seems to have been a generalized get-acquainted social discussion, not a comparison of firm career goals. TR 526

McCoy was a frequent visitor to Plant Vogtle and kept in close contact with Bockhold there. It was his observation that Mosbaugh was "very competent" in technical skills, but needed improvement in communication skills as a manager. TR 527 McCoy's testimony supports Bockhold's averment that Bockhold's "teamwork" meeting in January 1990 with Mosbaugh and Kitchens was the result of McCoy's directive to focus on improving management skills of the senior managers at Plant Vogtle. TR 531 Bockhold reported to McCoy, after that "teamwork" meeting, that it had been an open and productive session. TR 532

Once the Unit 2 reactor went into commercial service in May 1989, it became necessary to scale down employee strength from the higher levels needed for the testing functions performed in the pre-operation, or "start-up" status of the plant. TR 530 Accordingly, the "downsized" reorganization for Plant Vogtle was agreed upon, and then made public in February 1990. McCoy was

aware that this was a traumatic period for personnel at the plant, and that fact was a basis for the determination not to release employees immediately, but to scale down gradually by attrition. TR 535

McCoy testified that Mosbaugh knew from approximately July 1988 that his formal position at Plant Vogtle would be eliminated after "start-up" was completed. TR 603 McCoy testified:

> ... we were at that time staffing the corporate support organization for the Vogtle project for the first time, and we offered Allen a job in the corporate support organization with the recognition at that time his job was going to be going away after start-up...
>
> ... but he declined that job at that time and expressed that his desire was to stay in Augusta, and so, you know, I wanted to make clear to him in doing that he was taking some risk because his job was going to be done away with and you know, we would just have to see what was available at that time, so I remember that discussion also. TR 537

McCoy participated in handling the FAVA matter. He believed that use of that filter temporarily, while a permanent device was designed and installed, would serve a good purpose. The FAVA device was an experimental device to filter out fine radioactive particles in liquid being discharged from the plant. It had been tested with success, and then taken out of service some time earlier. After Mosbaugh raised his concerns about the system in the PRB vote in February 1990, McCoy arranged for more analysis, and to have the NRC "take a look" at the system. Eventually, based on his discussions with the NRC's regional staff after they had "looked at it," McCoy concluded that NRC had no objection to use of the FAVA filter. TR 533, 540

McCoy was at a hotel in Augusta on September 11, 1990, awaiting to be deposed by Mosbaugh's attorney the next day, when he was advised by GPC's attorney about Mosbaugh's tape recording activities at Plant Vogtle. The next day, together with Bockhold, he was told of the extent of that recording activity, particularly that "at least 30 people had been identified as having been secretly tape recorded." TR 543

McCoy then telephoned his "boss" as SONOPCO in Birmingham, either Hairston or McDonald, to let them know. He also learned later that day that Mosbaugh had filed a petition with the NRC regarding the legality of the corporate control and operation of

Plant Vogtle by GPC. He then also advised his management at SONOPCO of that fact. TR 543

In June 1990, after he learned of Mosbaugh's first DOL complaint, it was McCoy who gave instructions to Bockhold to have Mosbaugh tell his concerns to the NRC and to have Leo Glenn get involved in that process. Later, after Mosbaugh told Glenn he preferred to talk only to the NRC, McCoy instructed Bockhold to instruct Mosbaugh to make known any of his concerns to the NRC. TR 545

When Mosbaugh was recommended for SRO school in July 1990, McCoy met with him to see if he was still considering an "early retirement," or would make a commitment to stay with the company. That meeting took place on July 11. TR 551 Several days after that meeting, in mid-July, McCoy approved Mosbaugh's selection for the SRO school, TR 589, and Mosbaugh was advised of that decision on July 17. TR 419 McCoy testified that Mosbaugh's activities filing quality concerns, his actions on the PRB, and his filing the DOL complaint had no consideration or impact in deciding to sent him to SRO school. TR 558

When McCoy spoke to Mosbaugh in February 1990, he testified, about a possible job opportunity in a nuclear plant start-up job with the TVA at its Watts Bar plant, it was merely the passing along of information, with McCoy recalling his prior discussion with Mosbaugh suggesting an interest in getting closer to his small farm near Cincinnati. TR 563-565 On cross examination on this point, McCoy conceded that, while he believed the Watts Bar plant was closer to Cincinnati than Augusta, he did not know how far it was from Cincinnati. TR 592

With respect to the requirement that Mosbaugh turned in his company car on being sent to SRO school, McCoy testified that this requirement was standard company policy for employees in Mosbaugh's category in this situation, and that the policy had been consistently followed in the past. TR 567 Tom Greene had kept his company car when he went to SRO school because his compensation package as an assistant general plant manager included a car for personal use. Managers below that level were assigned company cars if needed for job-related availability on night duty assignments or emergencies. Jim Beasley, the outage manager, had had to turn in his car on going to SRO for that reason. TR 566, 567

When McCoy learned on Wednesday, September 12, that Mosbaugh had tape recorded other workers at Plant Vogtle, he testified, he reacted as follows:

> I was upset. You know, there are several immediate kinds of reactions. One

was, you know, what would cause somebody to do that.

A second reaction was that in the environment that we had been trying to develop and working on in terms of teamwork and open communications, that could destroy all the things that we had been working for for a couple of years. TR 569

At his SONOPCO office in Birmingham on Thursday, September 13, McCoy recommended to his corporate superiors that Mosbaugh be placed on administrative leave while they investigated the circumstances. He testified:

Well, the primary factor was that I didn't feel that we could have open communication at the site with Allen there, that the employees at the site would not trust him, would not be willing to talk openly about any subjects.

I felt it would hamper any interactions we had with the NRC if they were aware that this kind of activity had been taking place. TR 570

Although the primary factor he considered was the impact on open communication at Plant Vogtle, McCoy testified, he also later became concerned that the taping had violated the "safeguards" requirements of the NRC, that is, the requirements for strict security for documents concerning safety of the nuclear plant. TR 571

McCoy also said he felt shocked to find out that Mosbaugh had been engaging in such tape recording activity, and felt concerned about Mosbaugh's motives. TR 574 He testified that he regarded placing Mosbaugh on administrative leave not as a punishment, but as a situation in which to find out "what was going on." TR 575 The actual decision to place Mosbaugh on leave was not made by McCoy, but by Dahlberg, GPC's president. TR 594

On Friday, September 14, McCoy consulted with GPC's attorneys in drafting the statement placing Mosbaugh on leave, and then he directed Bockhold to implement the action.

During the 30-day period following September 15, McCoy visited Plant Vogtle several times and discussed the matter with several managers, sitting in on a number of staff meetings. He testified that there "was a chill on the whole atmosphere in terms of working relationships and communications." TR 578

McCoy testified that he gave consideration to other options, such as allowing Mosbaugh to go forward with SRO school or being transferred to another plant, but concluded:

> ...that there just wasn't any place that we could use that kind of talent and have him be effective, that employees would not trust him, he could not be a supervisor, people would be reluctant to discuss their problems and so forth with him, and he would have a chilling effect on conversations he participated in. TR 579

At the end of the period of administrative leave, McCoy felt that Mosbaugh should be dismissed because he believed Mosbaugh could not be an effective manager or supervisor at GPC or SONOPCO in the future. He recommended dismissal to his corporate management. TR 581 At that time, McCoy did not know that Mosbaugh had filed anonymous allegations with the NRC about operations at Plant Vogtle. McCoy first became aware of that fact at a later date. Similarly, McCoy did not then know Mosbaugh had a "confidentiality agreement" with the NRC, or that Mosbaugh was having off-site confidential meetings with the NRC in the Summer of 1990. TR 586

With respect to Mosbaugh's activities and allegations to the NRC pointing out incorrect data in GPC's statements to the NRC about the diesel start-up testing following the March 1990 site area emergency, McCoy agreed on cross examination that he had been aware of these matters at the time Mosbaugh's employment was terminated. TR 612-615

A. W. Dahlberg, president and chief executive officer of the Georgia Power Company, testified at the hearing. He stated that he made the decision to place Mosbaugh on administrative leave for 30 days, and then later to terminate his employment. Dahlberg was informed by SONOPCO vice president McDonald on Wednesday, September 12, "that Mosbaugh had secretly taped conversations with numerous employees of the company, his fellow employees at the plant." TR 466 His reaction was anger, he said, because he thought that type of behavior "was something that should not be tolerated." At this time, Dahlberg did know that Mosbaugh had filed a whistleblower complaint with the Department of Labor. He stated:

> I did consider it. I guess I should say at the time I first found out about the tapes my reaction was that we should immediately dismiss Mr. Mosbaugh.
>
> I realized there was some sensitivity about that, I was concerned about the complaint that he had filed. I discussed it with Mr. McDonald on the telephone, and

> Mr. McDonald persuaded me that we should at least just go through a period of administrative leave to make sure that we understood the facts in the case,and I agreed to a period of thirty days to place him on administrative leave. TR 475

At the time the decision was made to put Mosbaugh on administrative leave, Dahlberg knew that, in addition to filing the DOL whistleblower complaint, Mosbaugh had internally raised issues about the FAVA filter and about the accuracy of GPC's responses to the NRC following the March 1990 site area emergency, a subject of investigation by a special investigative branch of the NRC, TR 515, but he did not know that Mosbaugh had made anonymous allegations to the NRC, that he had a "confidentiality agreement" with the NRC, or that he had filed the petition with the NRC challenging corporate control and operation of Plant Vogtle. TR 471, 489

Dahlberg knew then that Mosbaugh had been selected to go to SRO school, and that he was a valuable company employee. He testified:

> I was familiar with Mr. Mosbaugh, I wasn't familiar with all of his professional credentials.
>
> I recognized, however, that if he had been placed in an acting manager's position he obviously had value, and if we had made a decision to include him in the SRO training he had value, so I certainly was aware of that, and that is a part of the consideration, but I really thought the circumstances were so strong that even with that value that the decision was correct. TR 481

During the 30-day period Mosbaugh was on administrative leave, Dahlberg discussed the matter regularly with McDonald and Hairston, and with the company's lawyers, TR 499, but concluded that dismissal was the correct decision. He testified:

> I didn't find anything in the investigation that made any conclusion other than the fact Mr. Mosbaugh had conducted the taping on his own, not at anybody else's request, it didn't change my opinion that it had destroyed the relationship that he had with other employees and our ability to conduct business. Nothing persuaded me that he could effectively operate as an employee of the company because of that, and my decision was the same that he should be dismissed. TR 478
>
> Mr. McDonald again reviewed the circumstances with me, and he may have recommended, but if he had not I would

have made the same decision, I would have at that time made that decision, and I'm not sure whether he said "I think we should" or I said that, but ultimately the decision was mine and I made it. TR 479

When asked on cross examination why the company had not included a specific prohibition against secret tape recording in the company's formal work rules and policies, Dahlberg stated:

I consider that conduct to be intolerable. I don't think it's something that should be accepted. That was the decision that I made, and I still believe that's the correct decision.

I don't think most employees, rational employees, would secretly engage in taping conversations with their fellow employees. I don't think you have a policy for every piece of conduct for an employee; I don't think that's necessary. TR 486

With respect to Mosbaugh's purpose in tape recording conversations so as to gather information for the NRC, Dahlberg stated:

If he had operated under the supervision of the NRC at their request as an employee of NRC and I had known that, then I don't think he would have been terminated.

The facts in this case are that I didn't know he was working with the NRC, I don't know that today. I knew that he tape recorded more than three hundred conversations with employees, and I later learned with also employees of the NRC, operating on his own, not at their request, not under their supervision, not being paid by them, and for that he was dismissed. TR 488

6. Mosbaugh's Tape Recording: Reasons and Scope. Mosbaugh decided to conduct his secret tape recordings of conversations at Plant Vogtle in February 1990. At that time he felt significant fear of retaliation. He had concluded that management of Plant Vogtle was fostering risk-taking in making decisions, to the point of violating NRC requirements so that GPC's own scheduling requirements would be met. TR 109 He had been pressing his internal questioning on important safety and regulatory matters, his recent anonymous allegations of potentially criminal violations were being investigated on-site by the NRC-OI, and he felt a burden of suspicion directed toward himself. TR 352 He then came to believe that his personal notes and recollections of conversations and events were not supported by hard documentation, and could be contradicted by others at the plant. TR 190 He apparently came to believe that he had verbal evidence

of intentional violations, and knew "no other way" to document or substantiate his evidence than by tape recording. TR 190

At that time he reviewed a legal opinion, CX 26, in the files of GPC at Plant Vogtle, and concluded that this legal opinion had application to the tape recording activities he would undertake, that the legal opinion:

> ... says in essence there should be no problem with managers doing one-party tape recording. TR 191

Mosbaugh concluded:

> My understanding [was] that there was no policy prohibiting one-party taping by personnel, by managers, and my understanding of this memo is that the conclusion was that there was no legal problem with doing one-party taping by managers. TR 194

Mosbaugh reviewed other GPC policy documents relating to this general subject, such as searches, contraband, prohibitions, plant rules, etc., and found no policy bar prohibiting his planned tape recording. TR 194, and following.

The legal opinion referred to by Mr. Mosbaugh, CX 26, is a July 15, 1988 letter from outside counsel to the Security Manager for Plant Vogtle concerning proposed tape recording of incoming telephone calls in an effort to identify sources of threats of violence. The opinion provides a brief review of federal wiretapping law, Federal Communications Commission regulations of telephone service, and the Georgia state privacy statutes. The opinion concludes that, except for a "remote possibility" of a dispute with the FCC regulated telephone company:

> ... there should be no legal problems with attaching tape recorders to the telephones of Georgia Power managers as long as they are given control over whether particular conversations are recorded. CX 16, p. 3

When Mosbaugh was told that his annual performance review would be conducted on February 23, 1990, he felt apprehensive that the company might try to "pull something" related to his job situation during the performance review, and he proceeded to tape record that meeting. That was the first of his tape recordings of conversations at Plant Vogtle. TR 202 Mosbaugh placed a small, $39 department store pocket microcassette tape recorder in his pants pocket, and switched it on to record the conversation. TR 204

For about a month, Mosbaugh recorded selected and limited conversations in this manner, perhaps 3 tape recordings in all. On March 20, 1990, however, the "Site Area Emergency" occurred,

the next highest level of emergency that could take place at a nuclear plant. In the course of staff meetings in the succeeding days, Mosbaugh detected the "non-conservative, risk-taking" attitude he previously had been concerned about, which disturbed him a great deal, and he concluded that his note-taking was inadequate to document what he observed. Accordingly, he then began to tape record conversations daily, more continuously, accumulating the total of 277 audiocassettes discussed above, with as much as 2 hours of tape recording on each cassette. As discussed above, Mosbaugh did not advise the NRC of his tape recording activity until September 1990, at the time of his pre-trial deposition by the Georgia Power Company.

7. Plant Vogtle Cohort Response to the Taping. Michael W. Horton was the manager, engineering support, in the plant "support" department during the time Mosbaugh was the acting head of that department at Plant Vogtle, and he continued in that position in July 1990 when Mosbaugh had been replaced by Tom Greene. On July 18, Horton participated in a conference telephone call with a number of other participants from Plant Vogtle, the corporate staff, and representatives of Cooper Industries, the vendor of the plant's diesel generators. This was a type of "party line' hook-up, with any number of participants able to participate or listen in on extension telephones or speaker phones. The discussion related to a serious problem, a manufacturer's defect causing starting failures. The degree of seriousness to be determined would affect the type of report that would have to be made to the NRC. Horton recalled a wide ranging discussion, and exchange of opinions, among the participants. He did not know that Mossbaugh was a participant in the conference call. Mosbaugh stated at the hearing that he did not think the other participants in the conference call knew he was tape recording the conversation. TR 424 Horton later learned that Mosbaugh had tape recorded that conference call, and that, in addition, he had tape recorded other conversations at the plant over the prior months. At the hearing Horton expressed "extreme disappointment" with Mosbaugh for having recorded such conversations. He said:

> I guess basically just extreme disappointment, mistrust in -- you know, thoughts race through your mind as to what all occurred over the last six months, and thinking of situations "Well, what was his motivation at this time," and "What was going on here when he was guiding me in this direction," and what have you, and just kind of betrayal in general. TR 812

Horton said he thought the tape recording conduct would affect Mosbaugh's ability to be a manager at Plant Vogtle in the future, saying it would dampen discussions and free expression, and raise the fear of being second guessed and having opinions

taken out of context at a later time. Since operation of the plant required close interpretations of NRC rules and regulations that are not always clear, he testified:

> ... to have differences of opinion aired openly is healthy, and it's a necessity to survive to come to the correct decision, to get everybody's input. If you have an environment where that wasn't possible, you would be kind of strangled. TR 813

Several other Plant Vogtle employees were presented at the hearing and testified to similar feelings and reactions when they learned that Mosbaugh had been secretly tape recording conversations at Plant Vogtle. One of them, Lee Mansfield, an engineer who reported to Horton, also recalled that Mosbaugh seemed in 1990 to be "bringing up old issues that had long since been decided." TR 844 Concerning Mosbaugh's tape recording activity, Mansfield stated:

> When I found out that Mr. Mosbaugh had been taping, it was one of the biggest surprises of my life.
>
> Mr. Mosbaugh and I had been, you know, had a good working relationship, we had actually been very good friends.
>
> I felt betrayed, I felt like my privacy had been invaded. I was just disgusted that this would have gone on without my knowing. TR 848

It was evident from the testimony of these witnesses that, after management notified the Plant Vogtle staff about nature and scope of Mosbaugh's tape recording activities in September 1990, that subject was discussed, with a general sharing of personal reactions, in a number of staff meetings at the plant. TR 858, and following.

David M. Herold, who holds a Ph.D. in organizational behavior and who is a professor at the School of Medicine at the Georgia Institute of Technology, testified on behalf of the Georgia Power Company. His work includes consulting with major corporations, including nuclear power companies, focusing on management problem solving, organizational structure, and management development and training. He was qualified to testify in this proceeding as an expert in organizational behavior. He reviewed portions of the transcripts of several of Mosbaugh's tape recordings and a number of other documents, and was given a general understanding of the circumstances of Mosbaugh's activities at Plant Vogtle. TR 743 He gave the opinion that the kind of taping activities done by Mosbaugh could dampen the free flow of information in the work environment and adversely affect

leadership, authority, communications, and teamwork within the workplace.

8. Discussion and Conclusions. The general rules governing the allocation of burdens and the order of presentation of proof in whistleblower protection cases arising under the Energy Reorganization Act, as implemented by 29 CFR Part 24, are well established. In Dartey v. Zack Company of Chicago, 82-ERA-2 (April 25, 1983), the Secretary of Labor held that a whistleblower complainant initially must present a prima facie case, consisting of a showing (1) that he engaged in protected conduct, (2) that the employer was aware of that conduct and took some adverse action against him, and (3) that the evidence is sufficient to raise the inference that the protected activity was the likely reason for the adverse action. If the employee establishes a prima facie case, the employer has the burden of going forward with evidence of legitimate, nondiscriminatory reasons for the adverse action. If the employer presents sufficient evidence to rebut the prima facie case, the employee still may demonstrate that the proffered reasons for the adverse action were not the true reasons, but a pretext for discrimination. Throughout this process of analysis, the employee bears the ultimate burden of persuasion, by a preponderance of the evidence. These general rules are derived from Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981), and Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977).

In this case, the Georgia Power Company contends that Mosbaugh has failed to prove a prima facie case, but its analysis on this issue seems to equate that first stage proof requirement with the Complainant's ultimate burden of persuasion in the case. GPC contends that, while those of Mosbaugh's activities directly associated with NRC contact were protected activity under the statute, his tape recording activity was not so protected, and that, since he was discharged for the taping activities alone, his claim of retaliatory discharge "fails as a matter of law." That approach to determining the existence of a prima facie case is too rigid an application of the Dartey/Burdine standards. The requirement of proof of a prima facie case is not intended to be "an onerous burden," Burdine, at 253, but rather the first of several stages of a "sensible, orderly way to evaluate the evidence in light of common experience" as it bears on the ultimate determination to be made. Compare U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 103 S. Ct. 1478 (1982).

Even if Mosbaugh's secret tape recording activity at Plant Vogtle was, in itself, conduct not protected by the Energy Reorganization Act, as GPC here contends, such a fact would not be dispositive of this complaint. A complainant is not required to prove that protected activities were the sole, or principal,

reason for the employer's adverse actions. It is sufficient to prove that the adverse actions were motivated at least in part by protected activities. See DeFord v. Secretary of Labor, 700 F. 2d 281 (6th Cir. 1983) and Mackowiac v. Univer. Nuclear Systems, Inc., 735 F. 2d 1159 (9th Cir. 1984). Moreover, while a complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse actions, that retaliatory motive is provable by circumstantial evidence. Ellis Fischel State Cancer Hosp. v. Marshall, 629 F. 2d 563 (8th Cir. 1980).

The circumstantial evidence in this case is sufficient to raise an inference that the tape recording activity, or at least its disclosure to GPC in September 1990, was a culmination of events in Mosbaugh's recent dealings with his GPC management, a final straw in that relationship, not a discrete event leading to a discrete company response. The circumstances affecting the top levels of management of Plant Vogtle, GPC, and SONOPCO, from plant manager Bockhold to corporate president Dahlberg, were truly extraordinary during the week of September 11, 1990: top management officials were being deposed in the litigation over Mosbaugh's June 6 whistleblower complaint; they had just weeks earlier come through an unusual "team inspection" by the NRC; at least some of these of top management officials knew that Mossbaugh was directing his additional "concerns" personally and privately to the NRC in his "whistleblower" persona; and at least some of them knew he had tenaciously pursued a number of troublesome "concerns" internally in recent months, particularly on the FAVA matter and the question of "false" reports to the NRC following the March 1990 site area emergency. In the week of September 11 these management officials suddenly also learned that Mosbaugh had secretly tape recorded up to 600 hours of conversations at Plant Vogtle over the prior 6 or 7 months -- and now had given over those tapes to the NRC in accordance with a judge's order -- and that Mosbaugh had now filed a petition with the NRC challenging the very legality of GPC/SONOPCO corporate control and operation of Plant Vogtle.

I conclude that, absent GPC's production of evidence of a purported legitimate basis for its adverse actions toward Mosbaugh, the coming together of events and issues during the week of September 11 -- a time when top management officials were personally testifying in depositions concerning their dealings with Mosbaugh who may have tape recorded those dealings -- would present a sufficient chain of facts from which it could readily be inferred that all of Mosbaugh's 1990 "concerns" activities, not just the tape recording, were the reason for discharging him. Given that conclusion, and the evidentiary showing by GPC that the discharge was caused only by revelation of his secret tape recording activity, I further conclude that all of the evidence must be evaluated to determine whether unlawful retaliatory

action against Mosbaugh has been established by a preponderance of the evidence.

Complainant contends that, given the nature of the "willful wrongdoing" he was seeking to document, his tape recording activity at Plant Vogtle was the only reasonable method he could utilize to secure such documentation. Accordingly, he contends, since his tape recording activity was reasonable and in furtherance of the statutory purposes of the Energy Reorganization Act, such activity may not by itself be a legitimate basis for his dismissal. Complainant's argument is not persuasive. Whistleblower activity is protected under the Energy Reorganization Act, but that protection is not absolute. In the Dartey case, supra, for example, which also involved a Section 5851 whistleblower complaint, the Secretary of Labor held that an employee who "committed an act which no employer need tolerate," misappropriation of confidential company records, had engaged in activity "which warranted suspension or discharge in the discretion of the employer." Dartey's complaint of retaliatory discharge was denied on that ground.

In the present case, it is not necessary to decide whether an employee's privately undertaken, secret tape recording of workplace conversations is, in itself, activity beyond Section 5851 protection, activity which "no employer need tolerate," the Dartey test. I agree with the argument of Respondent here that, assuming Mosbaugh's tape recording activity was protected at the outset, its continuation and scope became so egregious and potentially disruptive to the workplace that it lost any protected status it may have once possessed. Over a period of a number of months, Mosbaugh secretly tape recorded hundreds of hours of conversations at Plant Vogtle, conversations with and between his subordinates, his peers, and his superiors in the company, and did so entirely on his own. As noted by the Secretary of Labor in Dartey, there are formal legal avenues available for obtaining evidence of illegal conduct in investigation and enforcement proceedings. By the end of March 1990, Mosbaugh had already filed three anonymous reports to the NRC and given testimony to an NRC investigator, with detailed allegations of willful, arguably criminal, "blatant disregard" of safety compliance regulations. Having placed these matters into the hands of competent governmental authority, the NRC criminal investigators, it was no longer reasonable or appropriate for Mosbaugh to go forward, on his own authority, with the tape recording aspect of his private investigation at Plant Vogtle. His co-workers have given credible testimony that sufficiently supports the company position: that Mosbaugh would no longer be an effective employee at Plant Vogtle because fellow employees would fear working with him there. I conclude that GPC had a valid reason to take strong adverse action against Mosbaugh on learning of his extensive tape recording activity at Plant

Vogtle, including placing him on leave for a period of time, and discharging him after considering its options.

I further conclude that the evidence does not show GPC's reasons to have been a pretext for unlawful retaliation. GPC president Dahlberg testified that he personally made the decisions to put Mosbaugh on leave and then to discharge him, and that he did so solely because of the tape recording activity. I credit his testimony that he wanted to fire Mosbaugh on Wednesday September 12 as soon as he learned of the taping, that he was prevailed upon by his vice president McDonald to hold off for a period of time, and that he was not persuaded to do anything else at the end of that waiting period. On September 12 Dahlberg was aware of Mosbaugh's June DOL whistleblower complaint and he was aware that Mosbaugh had pressed "concerns' such as the FAVA issue at Plant Vogtle, but he also knew that Mosbaugh had been selected to attend SRO school despite that ostensible whistleblowing activity. Before he made the final decision to fire Mosbaugh, Dahlberg learned that the hundreds of hours of tape recordings had been turned over to the NRC, and that Mosbaugh had filed a petition challenging GPC/SONOPCO operation of Plant Vogtle, but those facts do not move me to a different conclusion. The 30-day waiting period for investigation was for Dahlberg not anything more than a time to discover whether there was a factual basis or a legal basis to persuade him not to fire Mosbaugh. In light of the Dartey holding, Dahlberg was not required by law to follow a different course. The new information coming to light while Mosbaugh was on administrative leave, that Mosbaugh's improperly obtained investigative evidence had been turned over to the government, and that Mosbaugh had filed a petition hostile to Dahlberg's interests, did not strip GPC of its right to act, wisely or unwisely, as an employer.

I have carefully and skeptically examined the record of Mosbaugh's dealings with McCoy and Bockhold, in particular, for facts to justify disbelief of GPC's asserted reasons for firing Mosbaugh. Bockhold worked directly with Mosbaugh at Plant Vogtle, and McCoy was Bockhold's supervisor at the corporate level. As Mosbaugh's immediate supervisors, they would obviously be accountable for the failures or wrongdoing implicit in Mosbaugh's allegations. However, I conclude that if they harbored a retaliatory animus prior to the September 1990 disclosure of the taping by Mosbaugh, they concealed it well. Their dealings with Mosbaugh seem to have been even-handed and fair up to the time he was assigned to SRO school. The record shows that Mosbaugh should not have been surprised that his job slot would be eliminated in the approaching 1990 reorganization, nor that Tom Greene would "come back" from SRO school to his own job slot at about the time he did so. There is no evidence that Greene's stay at SRO school was shortened, thus to provide a pretextual basis for ousting Mosbaugh. The reasons stated for Mosbaugh's removal from the Plant Review Board were entirely

credible in those circumstances, as were the reasons for Bockhold's giving Mosbaugh special assignments prior to the SRO school, and for taking away his company car in August. From all appearances on this record, McCoy and Bockhold collaborated in assisting Mosbaugh, during a time he was not making things easier for them, by having Mosbaugh assigned to SRO school, a highly desirable assignment for a GPC employee with his credentials. Whatever could have been their private motivations for doing so, it was an assignment favorable, not adverse, to Mosbaugh's career interests.

Ultimately, I conclude that Complainant has not established that Respondent has violated the whistleblower protection provisions of the Energy Reorganization Act, and, accordingly, I recommend that these complaints be dismissed.

RECOMMENDED ORDER

It is ORDERED that the complaints of Allen Mosbaugh in Cases Nos. 91-ERA-1 and 91-ERA-11 be dismissed.

Robert M. Glennon

ROBERT M. GLENNON
Administrative Law Judge

SERVICE SHEET

CASE NAME: *ALLEN MOSBAUGH V. GEORGIA POWER COMPANY*

CASE NOS.: *91-ERA-1*
91-ERA-11

Title of Document: *RECOMMENDED DECISION AND ORDER*

I hereby certify that a copy of the foregoing document was mailed to the following parties and their representatives at their last known addresses listed below.

Allen L. Mosbaugh
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Grovetown, GA 30813

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Atlanta, GA 30323

Loretta Tucker
Legal Technician
Loretta Tucker

A F F I D A V I T

STATE OF GEORGIA

COUNTY OF FULTON

Personally appeared before the undersigned, duly authorized to administer oaths in the State and County aforesaid, Cynthia M. Crane, who after being duly sworn, states and deposes on oath as follows:

1. My name is Cynthia M. Crane, and I am employed as a paralegal assistant for Troutman Sanders. I reside at 1166 Arden Drive, Marietta, Georgia and I am over 18 years of age.

2. I contacted the Clermont County, Ohio Board of Elections on December 16, 1992, and December 17, 1992, and spoke with two clerks, Dorothy Ficks and Patty McKinley, respectively. They both verified that Allen L. Mosbaugh of 2692 Boggs Road in Amelia, Ohio was registered to vote in Clermont County. The clerks stated that he registered to vote on September 18, 1992 and that the Board of Elections Ledger indicated that he voted in the November 1992 General Election.

3. I requested the Clermont County clerks to telefacsimile to me a copy of Mr. Mosbaugh's voter registration card to confirm the information contained in paragraph 2 above. That facsimile is attached hereto as Exhibit A and made a part hereof.

4. On December 18, 1992, I again contacted Patty McKinley and requested that she telefacsimile to me a copy of the official ledger which included Mr. Mosbaugh's signature indicating he voted in the November 3, 1992 General Election in Clermont County, Ohio. The facsimile which she sent to me is attached hereto as Exhibit B and made a part hereof.

5. I contacted the Columbia County, Georgia Board of Elections on December 17, 1992 and spoke with Nellie Ruth Olson, the Chief Deputy Registrar. She verified that Allen L. Mosbaugh registered to vote in Columbia County on October 8, 1988 and voted in the November 1988 General Election and the November 1991 Special Election, but that he did <u>not</u> vote in any of the 1992 elections in Columbia County, Georgia. I asked Ms. Olson to telefacsimile a copy of Mr. Mosbaugh's voter registration card to me verifying the information in paragraph 6 and above. Ms. Olson provided me, by overnight express mail, a certified copy of his voter registration card as well as a certified copy of the entry in the Columbia County Board of Elections database indicating Allen L. Mosbaugh's voting record. The certified copies are attached hereto as Exhibit C and made a part hereof.

FURTHER AFFIANT SAYETH NOT

Cynthia M. Crane

Cynthia M. Crane

Sworn to an subscribed
before me this 22nd day
of December, 1992

Cindy A. Leak

Notary Public

Notary Public, Fulton County, Georgia
My Commission Expires March 15, 1996

(NOTARIAL SEAL)

EXHIBIT A

64764M

CLERMONT COUNTY, OHIO

Name (Last) Mosbaugh (First) Allen (Middle Initial) Lee

County of your residence Clermont

Residence (Home) Address (Number and Street) 2692 Boggs Rd. (Apt.)

City or Post Office Amelia

Zip Code 45102

Additional Rural or Mailing Address (if necessary)

Birthdate: 8-16-48

Birthplace (City, State, Country) Cincinnati, Ohio, USA

Native Born Citizen? ☒ Yes ☐ No

If Naturalized give: Date and Name of Court

Furnishing your Social Security and phone number is voluntary; their confidentiality cannot be guaranteed. ORC 3503.14 will enable the Board of Elections to verify your registration.

Social Security Number 272-44-1887

Phone No. 513-797-4558

Previous registration Address (Number and Street) 1701 King's Ct.

City or Post Office Grovetown

County Columbia

State Georgia

CHANGE OF NAME ONLY: Prior Legal Name

Former Signature

☒ New Registration (I am not now registered to vote in Ohio or I have moved to a different county)

☐ Change of Address (I moved/will move within the same county on _____ Date)

☐ Change of Name

I declare under penalty of election falsification that the statements herein contained are true to the best of my knowledge and belief, and that I am legally qualified to vote.

Signature of Applicant: Allen L. Mosbaugh Date: 9-18-92

Signature of Registrar (if any) Date

FOR BOARD USE ONLY. If "X" appears in box, current address is on back of card ☐

City, Village, Twp. ME

Ward

Precinct B

School Dist. NR

	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26
SPECIAL																																																
PRIMARY																																																
YEAR																																															
GENERAL		X																																													

IF "X" APPEARS IN BOX CURRENT ADDRESS IS ON BACK OF CARD ☐

AT ELECTION VOTES, PLACE "X" IN PROPER SPACE. AT PRIMARY ELECTIONS USE PARTY INITIAL. AT GENERAL ELECTIONS RECORD FAILURE TO VOTE BY PLACING "NO" IN PROPER SPACE.

MOSBAUGH, ALLEN LEE

IMPORTANT!
This information must be given

TOTAL NUMBER OF PERSONS WHO VOTED 233 + 1

EXHIBIT B

After the Vote is Tallied, and the Certificates are signed,
BE SURE TO SEAL THIS BOOK
and hand it to the Presiding Judge for Delivery

TO THE

BOARD OF ELECTIONS OFFICE

FOR DELIVERY BY THEM TO

THE CLERK OF THE COURT OF COMMON PLEAS
OF SAID COUNTY

POLL BOOK

OF THE ELECTION HELD

CLERMONT COUNTY
088 MONROE TWP
PRECINCT B

ELECTION DATE 11/03/92

Signed Elizabeth T. Rosenberger
(Judge who made this Book)

Address 116 Cherokee Trail, New Richmond, OH 45157

Published by
DAYTON LEGAL BLANK, INC.
SPECIALISTS IN ELECTION SUPPLIES
DAYTON, OHIO 45401

N-2033

EXHIBIT B

No.	NAMES OF ELECTORS INDICATE BALLOTS GIVEN TO VOTER BY RECORDING BALLOT STUB NUMBER UNDER PROPER BALLOT TITLES	ELECTORS' ADDRESSES ELECTION OFFICIALS SHALL WRITE IN THIS SPACE THE STREET AND POST OFFICE ADDRESS OF EACH ELECTOR. ENTER BALLOT STUB NUMBER UNDER PROPER TITLE	A	B	C	D	E	F	G
81	Mary C. Stevens	2325 Lindale-Nichols R. Amelia	81	81	81	81	81	81	81
82	Edward G. Meredith	2416 Laurel-Lindale Rd. N.R. 45157	82	82	82	82	82	82	82
83	Donna J. Meredith	2416 Laurel-Lindale Rd. N.R. 45157	83	83	83	83	83	83	83
84	Mary L. Cyrill [illegible]	2443 Laurel-Lindale Rd. N.R. 45157	84	84	84	84	84	84	84
* 85	Allen L. Montaugh	2622 Bzzy Rd. Amelia 45102	85	85	85	85	85	85	85
86	Elizabeth A. Gurley	3 Cherokee Trail N.R.	86	86	86	86	86	86	86
87	Phyllis J. Taylor	3 Cherokee Trail N.R. 45157	87	87	87	87	87	87	87
88	Jerry Dempsey	1959 Lindale-Nichols Amelia 45102	88	88	88	88	88	88	88
89	Malcolm R. Tucker	1761 Lindale-Nichols Amelia	89	89	89	89	89	89	89
90	Delores J. Tucker	1761 Lindale-Nichols Amelia 45102	90	90	90	90	90	90	90
91	David K. Butler	2730 St. Rt. 222 Bethel 45106	91	91	91	91	91	91	91
92	Kim Lindsle	2447 Laurel-Lindale N.R. 45157	92	92	92	92	92	92	92
93	Gene M. Lindsle, III	2447 Laurel-Lindale N.R. 45157	93	93	93	93	93	93	93
94	Arlene Livingston	2757 Laurel-Lindale N.R. 45157	94	94	94	94	94	94	94
95	Walter R. Livingston	2757 Laurel-Lindale N.R. 45157	95	95	95	95	95	95	95
96	Jennifer L. Krause	2730 St. Rt. 222 Bethel 45106	96	96	96	96	96	96	96
97	Ruth A. Hand	2836 Laurel-Lindale Rd. N.R. 45157	97	97	97	97	97	97	97
98	Glenn A. Hand	2836 Laurel-Lindale Rd. N.R.	98	98	98	98	98	98	98
99	Judy K. Taylor	2414 Laurel-Lindale Rd. N.R. 45157	99	99	99	99	99	99	99
100	Elizabeth A. Perkins	2694 St. Rt. 222 Bethel 45106	100	100	100	100	100	100	100
101	Robert W. Hart	2045 Lindale-Nichols Amelia 45102	101	101	101	101	101	101	101
102	Robert K. Lindsle	2693 St. Rt. 222 Bethel 45106	102	102	102	102	102	102	102
103	Tom R. Campbell	2695 St. Rt. 222 Bethel 45106	103	103	103	103	103	103	103
104	Virginia S. Applegate	1847 Rolling Hills Dr. N.R. 45157	104	104	104	104	104	104	104
105	Norma R. Applegate	1847 Rolling Hills Dr. N.R. 45157	105	105	105	105	105	105	105
106	Brenda K. Grubbs	2639 Laurel-Lindale Rd. N.R. 45157	106	106	106	106	106	106	106
107	Thomas J. Grubbs	2639 Laurel-Lindale Rd. N.R. 45157	107	107	107	107	107	107	107
108	Robert P. Gross	2096 Bzzy Rd. Amelia 45102	108	108	108	108	108	108	108
109	Nell Kudell Gross	2096 Bzzy Rd. Amelia 45102	109	109	109	109	109	109	109
110	Gloria L. Hall	2730 St. Rt. 222 Bethel 45106	110	110	110	110	110	110	110
111	Glen R. Hill	2730 St. Rt. 222 Bethel 45106	111	111	111	111	111	111	111
112	Ronnie E. Hill	2730 St. Rt. 222 Bethel 45106	112	112	112	112	112	112	112
113	Harvey Jr. Newkirk Jr.	2730 St. Rt. 222 Bethel 45106	113	113	113	113	113	113	113
114	David L. Randolph	2690-1 Lindale Bethel 45106	114	114	114	114	114	114	114
115	Anne T. Owens	2414 Laurel-Lindale Rd. N.R. 45157	115	115	115	115	115	115	115
116	Herman L. Kincaid	2730 St. Rt. 222 Bethel 45106	116	116	116	116	116	116	116
117	Catherine L. Roberts	2699 Bzzy Rd. Amelia 45102	117	117	117	117	117	117	117
118	Walter R. Hafling	2 Cherokee Trail N.R. 45157	118	118	118	118	118	118	118
119	Mary N. Buchanan	2281 S. Bantam Bethel 45106	119	119	119	119	119	119	119
120	Clark A. Dawson	1951 Lindale-Nichols Amelia 45102	120	120	120	120	120	120	120

Total each column and carry amount forward to top of next page

EXHIBIT B

No person shall vote or attempt to vote at any primary, special, or general election in a precinct in which he is not a legally qualified voter, or vote or attempt to vote more than once at the same election, or impersonate or sign the name of another person, real or fictitious, living or dead, and vote or attempt to vote as such person in any such election, or vote or attempt to vote at any primary the ballot of a political party with which he has not been affiliated, as required by section 3513.19 of the Revised Code, or with which he did not vote at the last election, or cast a ballot at any such election after objection has been made and sustained to his vote, or knowingly vote or attempt to vote a ballot other than the official ballot. Whoever violates this section is guilty of a felony of the fourth degree. O.R.C. 3599.12

☐

ELECTION NAME GENERAL ELECTION 11/03/92 — POLL LIST — PRECINCT MONROE TWP 2 — Clermont Co. OH — PAGE NO. 2911

LINE NO.	AFFIDAVIT NO.	PRECINCT	SIGNATURE OF VOTER	PTY	NAME			RESIDENCE OF VOTER		
221	639620	✓			MC GUIRE	BENJAMIN	M	2710 NEW RICHMOND	HILLTOP 45157	CT
222	332528	✓	Elizabeth A McMillin		MC MILLIN	ELIZABETH	A	2592 BETHEL	SNIDER 45106	RD
223	332610	✓	[illegible]		MC MILLIN	WALTER	M	2592 BETHEL	SNIDER 45106	RD
224	338650	✓	Daryl W Meyerrenne		MEYERRENNE	DARYL	W	14 NEW RICHMOND	CHEROKEE 45157	TL
225	338672	✓	Kimberly J Meyerrenne		MEYERRENNE	KIMBERLY	J	14 NEW RICHMOND	CHEROKEE 45157	TL
226	128820	✓	Joyce Miller		MILLER	JOYCE	E	2713 NEW RICHMOND	HILLTOP 45157	CT
227	615230	✓			MINTON	ROBERT	A	2720 BETHEL	STATE ROUTE 222 45106	
228	615228	✓			MINTON	ROBIN	Y	2720 BETHEL	STATE ROUTE 222 45106	
229	592052	✓	Melissa J Miracle		MIRACLE	MELISSA	J	2730 BETHEL	STATE ROUTE 222 45156	
230	581772	✓	Dennis E Moore		MOORE	DENNIS	E	1681 NEW RICHMOND	TWELVE MILE 45157	RD
231	636791	✓	James Moore		MOORE	JAMES		2631 NEW RICHMOND	LAUREL-LINDALE 45157	RD
232	636792	✓	Margaret Moore		MOORE	MARGARET		2631 NEW RICHMOND	LAUREL-LINDALE 45157	RD
233	596756	✓	Mary R Moore		MOORE	MARY	R	1681 NEW RICHMOND	TWELVE MILE 45157	RD
234	221040	✓	Inv Voter Absentee	AV	MORGAN	THERESA	L	2735 BETHEL	STATE ROUTE 222 45106	
235	623423	✓			MORRIS	DIANA	L	1692 NEW RICHMOND	TWELVE MILE 45157	RD
236	631940	✓			MORRIS	TAMMY	L	1692 NEW RICHMOND	TWELVE MILE 45157	RD
237	647647	✓	Allen L McGaugh		MOSBAUGH	ALLEN	L	2692 BOG AMELIA	BOGGS 45102	RD
238	634791	✓	Kathy Mosbaugh		MOSBAUGH	KATHY	J	2692 BOGGS AMELIA		RD
239	631139	✓	Jerry Mursinna Jr		MURSINNA JR	JERRY	R	2730 BETHEL	STATE ROUTE 222 45106	

ME-B-MR — MC GUIRE — BENJAMIN — M TO MURSINNA — JERRY — R

TOTAL P.04

EXHIBIT C

880 5706
(For Office Use)

REGISTRATION CARD

PLEASE PRINT OR TYPE

Nº 167428 Q

Date: 10 (Month) 8 (Day) 88 (Year)

70
(Precinct – For Office Use)

Name: Last Mosbaugh First Allen Middle or Initial Lee Maiden

Residence Address: 1701 King's Ct. Apt. Tel. No. (If Available) 863-2353

Town or City Grovetown County Columbia State Georgia Zip Code 30813

Place of Birth: City Cincinnati County Hamilton State Ohio Date of Birth: Mo. 8 Day 16 Yr. 48

Sex: M Height: 6' 2" Race: Cave S.S. No.: 272-44-1887 (If known) Will assistance in voting be required in the manner permitted by Code Sec. 21-2-409? ☐ Yes ☒ No

Mother's Maiden Name: Hain Father's Name: Richard

QUESTIONS PROPOUNDED TO APPLICANT

Have you ever been convicted in any court of competent jurisdiction of any felony involving moral turpitude, punishable by the laws of this state or any other state with imprisonment in the penitentiary? If so, what was the offense, the place, and court of conviction and the approximate date? If so, and if pardoned, what was the date of the pardon? If sentence has been completed, what was the date of completion? No

OATH OF APPLICANT

Georgia, COLUMBIA County

I do swear (or affirm) that I am a citizen of the United States, the State of Georgia and this County; that I am at least 18 years of age, or will be on the 8 day of October, 1988; that I possess the qualifications of an elector required by the laws of this State; that I am not registered to vote in any other County; or I am registered in Clermont County of the State of Ohio and request cancellation of my registration; that I am not registered to vote under any other name; that I have correctly answered the questions appearing elsewhere on this card under the words: "Questions Propounded to Applicant;" and that the information contained on this card is true.

SIGN HERE Allen Mosbaugh

Sworn to (or affirmed) and subscribed before me this 8th day of Oct, 1988, at the following location: Elec Bill

Identification Type: S.F. Ord (Deputy) Registrar

Form No. RC-86-G

GEORGIA, COLUMBIA MARTINEZ, GEORGIA

I, Nellie Ruth Olson, Deputy Registrar of Columbia county, Georgia, hereby certify that the above is the true and correct copy of the Voter's Registration Record of

Allen L. Mosbaugh

as appears on record in this office.

In Witness Whereof, I have hereunto set my hand and seal this 18 day of December, 1992

Nellie Ruth Olson
Deputy Registrar Columbia County, Georgia

John R. Lamb
Chairman, Board of Elections

Member, Board of Elections

Debra M. McCall
Member, Board of Elections

Valid only with original signature of issuing officer and raised seal.

EXHIBIT C

Print Key Output Page 1
5738SS1 V2R1M1 920306 COLUMBIA 12/18/92 12:10:19

Display Device . . . . . : DSP31
User . . . . . : RUDY

12:10:04 Columbia County Voter Registration 12/18/92
VRPV0032 Voting History

Voter ID: 8805706 Name: MOSBAUGH, ALLEN L

DATE	CODE	DATE	CODE	DATE	CODE	DATE	CODE
19911105	S	19881108	G				

F3=Exit Program F17=Return to Voter Data

I, Nellie Ruth Olson, Deputy Registrar of Columbia County, Georgia herby certify that the above is the true and correct copy of Allen Mosbaugh voting record.

19911105 S ----voted in November 5, 1991 in a Special Election
19881108 G-----Voted in November 8, 1988 in a General Election

Nellie Ruth Olson

Nellie Ruth Olson, Chief Deputy Registrar

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

DATE ISSUED: NOVEMBER 8, 1991

Case No.: 90-ERA-30

In the Matter of

MARVIN B. HOBBY,
Complainant

v.

GEORGIA POWER COMPANY,
Respondent

Michael D. Kohn, Esquire
David K. Colapinto, Esquire
Kohn, Kohn & Colapinto
For the Complainant

James Joiner, Esquire
William N. Withrow, Esquire
Troutman, Sanders, Lockerman
For the Respondent

Before: JOEL R. WILLIAMS
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provision of Section 210 of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. §5851, and the regulations promulgated thereunder, 29 C.F.R. Part 24.

The Complainant filed his initial complaint under the Act on or about February 6, 1990. This was supplemented on February 28, 1990. On March 26, 1990, the Acting Regional Director determined that the Complainant had been discriminated against for engaging in activity protected under the ERA and called for his restoration to his former position. The Respondent filed a timely request for a hearing. They also filed a complaint with the Secretary of Labor contending that the March 26, 1990 determination was made without their having been afforded a reasonable opportunity to participate in the investigation. Thereafter, the case was reconsidered by the District Director, Wage and Hour Division, based on additional information furnished by both parties. On May 25, 1990, the District Director amended the prior findings to the effect that the elimination of Complainant's job was not based on his having engaged in any

protected activity. The Complainant then filed a timely request for a hearing.

Following several continuances, requested and/or agreed to by the parties in order to allow time for protracted pretrial discovery, for resolution of discovery disputes, and for the disposition of various pretrial motions, the hearing was commenced in Decatur, Georgia, on October 23, 1990. It was recessed on October 26, 1990, and resumed and concluded in Washington, D.C. on November 13, 1990. The record was held open thereafter to permit the parties the opportunity to submit post-hearing briefs.

Summary of the Evidence

Based on the testimony adduced at the hearing and the documentary evidence admitted into the record, I consider what follows to be a fair representation of the pertinent evidence in this case.

Upon graduation from high school, the Complainant was given a full scholarship by a Dr. and Mrs. Claude Shingler to Mercer University where he received a Bachelor of Science degree in natural science concentration with a major in physics. Upon graduation, he went to work for Oak Ridge Associated Universities where he received additional training in nuclear physics, radiobiology, and radiochemistry. He first went to work for the Respondent in 1971 as the director of the visitors center at the Edwin J. Hatch nuclear plant in Baxley, Georgia. He was hired by George Head. He was transferred to Atlanta in 1973 or 1974 and became a member of the staff of an ad hoc executive committee which had been established in order to focus on some of the financial problems which the company was then experiencing. He was involved subsequently in assisting Mr. H. Grady Baker in negotiating the sale of approximately 50 percent of the company's interest in its two nuclear power plants to Oglethorpe Power Corporation and others.

The Complainant left Georgia Power in 1979 to assist Mrs. Shingler operate an alternative energy company. At the end of that year he heard of an opening at the Institute of Nuclear Power Operations (INPO), an industry group which had been established in Atlanta to assist the nuclear utility industry in achieving excellence in all aspects of the operation of nuclear power plants. He applied for the position of communications manager and was interviewed by Admiral Dennis Wilkinson, a retired naval nuclear expert, who had been selected as president of INPO after a nationwide search. The Complainant was hired by Admiral Wilkinson and eventually became his assistant and

secretary of the corporation. In 1984, he was loaned by INPO to a group called the Nuclear Utilities Management and Human Resources Committee (NUMARC), which had been established in order to offer viable solutions to the Nuclear Regulatory Commissioner's (NRC) concerns in lieu of additional regulations. While there he worked with J.H. Miller, the then president of Georgia Power Company and the first chairman of NUMARC.

As advised by Admiral Wilkinson, the Complainant had planned at some point in time to leave INPO and get back into the nuclear power industry. He discussed these plans with Mr. Miller, who offered him a position as his assistant at Georgia Power Company. His starting salary upon his return to Georgia Power was $76,000 per year. He was subsequently assigned a company car and included in a bonus program for senior people in the company. In addition to Mr. Miller, the Complainant reported also to Mr. Baker, who was then senior executive vice-president.

Georgia Power Company is owned by the Southern Company, an electric utility holding company which also owns Alabama Power and other companies. Both Georgia Power and Alabama Power had separately operated nuclear plants. While working for Mr. Miller, the Complainant suggested to him that the company again look into an earlier, unsuccessful plan to establish an operating company to operate all of the nuclear units. A task force was established to look into such a possibility. The Complainant served on Phase I of the task force. The task force recommended in July 1987 that a nuclear operating company be developed. The recommendation was accepted by the chief executive officers of the Southern system who decided to proceed with Phase II.

The Complainant declined to serve on Phase II of the task force. Instead, he rotated jobs with a Tom McHenry, and became manager of nuclear support of Georgia Power about September 1, 1987.

The Complainant's performance evaluation for 1987 was executed by Mr. Baker as Mr. Miller had retired in November of that year. Mr. Baker commented at the time that there was "no known limit" to the Complainant's future growth possibilities. In early 1988, Mr. Head, who was then senior vice president of fossil and hydro power, temporarily took on the additional responsibility of nuclear operations. During this time, the Complainant was assigned additional responsibilities which included nuclear security. Mr. Head began to implement a new management philosophy which placed more accountability for operation of the power plants in the plant managers with less corporate oversight. The Complainant supported this philosophy.

In April 1988, R.P. McDonald, who was a senior vice president of Alabama Power, was named to the additional position of executive vice president of Georgia Power with responsibility for nuclear operations. The Complainant had known Mr. McDonald since about 1981 and had a favorable working experience with him. Mr. McDonald believed that there should be no corporate oversight of nuclear operations. The implementation of this philosophy resulted in the Complainant's having insufficient work for his security staff, which included John Fuchko and Gary Yunker. He recommended to Mr. McDonald in April or early May 1988 that they either find something else for Mr. Fuchko and Mr. Yunker to do in the company or look at the possibility of outplacement. Mr. McDonald would not allow such actions. On June 1, 1988, due to one of several reorganizations which occurred that year, the Complainant no longer was responsible for supervising Mr. Fuchko or Mr. Yunker. During the same month, Alfred W. Dahlberg became president of Georgia Power.

On June 22, 1988, the Southern Company, Alabama Power Company and Georgia Power Company filed an application with the Securities and Exchange Commission (SEC) to form the Southern Nuclear Operating Company (SONOPCO). Oglethorpe Power Corporation filed a Motion to Intervene with the SEC in September 1988. As this caused a delay in the formation of SONOPCO as a corporate entity, it was decided to implement the SONOPCO idea in three phases. The first phase, which was instituted on or about November 1, 1988, was to begin operating SONOPCO as a division. As a result, all nuclear operations personnel were relocated to Birmingham, Alabama. The formation of SONOPCO was headed by Joe Farley, executive vice-president of the Southern Company. During this phase, Georgia Power continued to maintain the license for its two plants. Mr. McDonald retained his position as vice president of both Alabama Power and Georgia Power. Dr. Dahlberg, Mr. McDonald, Mr. Farley, Mr. Head and Mr. Baker testified to the combined effect that during Phase I, which was still in effect at the time of the hearing, Mr. McDonald reported to Mr. Dahlberg regarding operation of the two Georgia Power nuclear plants.

Mr. McDonald considered the Complainant to be "a valuable employee for a position in the new organization." (T 617) Upon being approached about transferring, the Complainant determined that he did not want to move to the SONOPCO project in Birmingham. The Complainant discussed with Mr. Baker the idea of establishing an interface group between Georgia Power and SONOPCO. Mr. Baker testified in this regard:

> Well, we formed this group because it was the thing we usually did, the company usually did, in a new activity like that is we usually form a group to specifically look after it.

> My own personal opinion is that that's not necessary but in this particular case, you know, I had Mr. Hobby and I didn't have anything really to do, for him to do, and I though that this might be an arrangement where he could make a contribution, and so we formed the nuclear operations operating group.
>
> It was not clear to me when we formed it exactly what it was to accomplish, except that it was to be an interface between the Georgia Power Company various Georgia Power Company departments and the various departments in the SONOPCO group.

(T-686)

The Complainant also discussed his idea with Mr. Head and prepared an outline as to how the group would be organized. Mr. Baker and Mr. Head discussed formation of the group with Mr. Dahlberg. At that point in time, Mr. Dahlberg believed that the SEC approval and incorporation of SONOPCO should take only a matter of months and when this occurred there would be a contract to administer between Georgia Power and SONOPCO. He anticipated also that Georgia Power "would need somebody to be involved in gathering information about the performance of the units, about budget, about safety facts." (T-330)

On December 27, 1988, Mr. Dahlberg issued to the executive and management staff the following memorandum, which had been prepared by the Complainant:

> As you know, Georgia Power Company's nuclear operations group has been relocated to Birmingham, Alabama. We are in the process of working out the agreements with our joint owners to establish Southern Nuclear Operating Company which, when finalized, will contract with us to operate our nuclear plants.
>
> It is important for us to realize that while our nuclear operations may be managed in Birmingham and ultimately will be managed by a separate Southern subsidiary, Georgia Power will be held accountable by our regulatory groups, our stockholders, and the public for the operation and performance of our nuclear units. It is essential that Georgia Power Company be involved in the operations of our units, monitor their performance and integrate nuclear operations goals, accountabilities, and financial planning into Georgia Power Corporate Plan.

> Effective immediately, a Nuclear Operations Contract Administration Group is formed to interface with our nuclear operations group in Birmingham. This group will report to Mr. G. F. Head, Senior Vice President, who will be responsible for all nuclear operations interactions.
>
> Mr. M. B. Hobby, Assistant to the Senior Executive Vice President, currently on loan to Nuclear Operations, is named General Manager Nuclear Operations Contract Administration and will report to Mr. Head.
>
> Your support as we move to restructure our nuclear operations group is appreciated.

(CX-8; RX-2)

Fuchko and Yunker filed a complaint under Section 210 of the ERA which was scheduled to be heard commencing January 3, 1989. A meeting was held on January 2, 1990, between members of the firm representing the Respondent in that matter, Troutman, Sanders, Lockerman & Ashmore (TSL&A), and the company employees who were anticipated witnesses on its behalf. The Complainant attended the meeting as did Mr. McDonald. The meeting was conducted by Jesse P. Schaudies, Jr. and Donald W. Janney, partners in TSL&A, assisted by Mark Bose and Chris Miller, associates with the firm. The entire group of 20 to 30 people initially met together in the Respondent's corporation board room. They then broke into two groups with one remaining with Messrs. Schaudies and Miller in the board room and the other meeting with Messrs. Janney and Bose in a room on the next floor. Mr. McDonald was in Mr. Schaudies group and the Complainant was in Mr. Janney's group.

At the initial session each potential witness was handed an individual compartmentalized list of areas about which they were expected to testify. The Complainant testified on direct examination in this regard as follows:

> Q. And what happened in the meeting after they handed out these outlines?
>
> A. I read over my outline, and I saw down toward the bottom there was a statement that says Hobby tried to terminate Yunker due to a lack of work, but it was vetoed by Mr. McDonald.
>
> I read that, that was not true because it said in the August 1988 time frame. I raised my

hand in the meeting and informed the attorney present that that was not a correct statement, that I had not tried simply to terminate Mr. Yunker, that my concern was with the lack of work for Mr. Yunker and Mr. Fuchko, and that I wanted to either look for other work in nuclear operations for them, look for other work at Georgia Power Company for them, or then as a last resort consider an outplacement, but I told the attorney it did not happen in August, that it happened back in the April-May time period.

Q. And was there any response to your comment?

A. Yes. The attorney asked me if I had made these recommendations back in the April-May time frame, that if I had realized that they did not have work to do why had I not taken action against them in the April-May time period, and I said because Mr. McDonald -- Mr. McDonald was sitting to my right -- I said because Mr. McDonald would [not] allow me to.

A. And was there any response after that?

A. Mr. McDonald said "I don't know what he's talking about, he's never talked to me about that."

Q. And do you remember anything else that occurred at that meeting?

A. Well, we dropped that subject after Mr. McDonald said he had never heard me discuss that with him, or that I had not discussed it with him.

(T 92-93)

Mr. Schaudies had the following recollection of the incident:

And then Mr. Hobby also raised an issue, and he said that he had been looking at his outline and that he thought it was incorrect to suggest that on August '88 he said he wanted to terminate Yunker due to lack of work, but vetoed by McDonald which is what the entry reads at the bottom of his page on Tab 8.

What he explained or began to explain was that he had actually a month before Fuchko and Yunker had submitted their letter of concerns to the company he had raised the issue with Mr. McDonald of whether these men should be terminated or reassigned or released, reduction in force or something like that, and he made the point that he had discussed it several times, and he was discussing termination as an option, not as the exclusive remedy and not only in August of '88.

Direct examination of Mr. Schaudies proceeded as follows:

Q. All right. Did Mr. McDonald make any comment about Mr. Hobby's statements regarding his testimony?

A. Mr. McDonald from the other side of the room started to inquire what it was he was saying and to make sure he understood, and I just kind of cut it off that it didn't seem appropriate for the group discussion, and I said "That's fine, Don Janney will handle that with Mr. Hobby upstairs and I'll talk to Pat about it," and it was just fine-tuning, one of the purposes we were there to make sure that we had all of the information and that the information on the, as you called them, outlines was proper, full and correct.

Q. Was there any inconsistency in Mr. Hobby's testimony and Mr. McDonald's testimony that was identified in that general session?

A. No, there wasn't. That was the -- the only comments that were made by either one of them that I recall in that general session were what I've already related to you.

There was no inconsistency at all. In fact, what I explained to Mr. Hobby saying and my recollection of what he said, rather than being anything that could be characterized as an inconsistency I felt was further support for the case.

> The case was a claim -- the Fuchko and Yunker petitioners were claiming that Mr. McDonald had intentionally discriminated against them and had placed them, not allowed them to get a job because of raising concerns, and here was Mr. Hobby saying "Wait a minute, months before I had given Mr. McDonald several opportunities to terminate these people who claimed to be whistle-blowers, and yet Mr. McDonald repeatedly chose not to do that."
>
> That was not an inconsistency at all.

(T721-722)

Mr. McDonald testified in substance that although he remembered attending the January 2, 1989 meeting, he did not recall any discussion about any inconsistency between his testimony and Mr. Hobby's testimony. (T-614). Mr. Janney stated that he was out of the room part of the time during the general session and that he did not remember the Complainant speaking up during the session.

The Complainant stated further that during the initial, general session, Mr. McDonald outlined his proposed testimony as to how the SONOPCO project was staffed. The Complainant was concerned because he believed "that the information that Mr. McDonald was giving as far as how people were selected, I believed that to be false." (T.-95). No discussion of Mr. McDonald's proposed testimony on this point was held during the general meeting.

When asked on direct examination what happened in the smaller meeting, the Complainant responded:

> We went over each individual's testimony in a little bit greater detail.
>
> At the conclusion of the meeting, though, one of the attorneys from Georgia Power Company, and my recollection is it was not an attorney who was in my smaller meeting group, came up to me -- the meeting was breaking up, he came up to me and he said "Mr. Hobby, we have a problem," and I said "What is it?", and he said that Mr. McDonald -- "Your story and Mr. McDonald's story does not match."
>
> We talked for a second about it. I said "Well, I'll tell you we've got a bigger problem, because Mr. McDonald's recollection, or Mr.

> McDonald's testimony that he is going to give as far as how people were selected for the SONOPCO project, that is not the way that I understand the selection to have been made."

When asked whether there was any response, the Complainant responded:

> The attorney said "Well, we've got a problem. We'll listen to what Mr. McDonald says on the stand, then we'll come back and get with you so you can change your testimony accordingly."

(T-96)

And when asked for his opinion as to the identity of that attorney, the Complainant replied:

> As I stated in my deposition, I believe the attorney was Mr. Jay Schaudies of the Troutman Sanders law firm, but as I said in my deposition my deposition I cannot be one hundred percent sure.

(T-97)

Mr. Schaudies testified that he had no conversation with the Complainant following the general meeting. Mr. Janney testified that in the discussions he had with the Complainant subsequent to the general meeting, there was no indication that his testimony was going to be inconsistent with Mr. McDonald's in regard to their Fuchko/Yunker conversations. He testified further that the Complainant never stated to him Mr. McDonald's description of the manner in which the SONOPCO project was staffed was inaccurate or incorrect. Mr. Janney replied in the negative when asked:

> "Did you ever go to Mr. Hobby and tell him that you or the lawyers in the Troutman Sanders firm were going to lister to Mr. McDonald's testimony and then come back to Mr. Hobby and tell him what to say so that it would be consistent with Mr. McDonald's testimony?

(T-771-772)

The Complainant went on to testify that as he was concerned about possibly being put in the position on the stand of contradicting Mr. McDonald and as he kenw that Mr. McHenry, who was scheduled to be a witness but did not attend the January 2 meeting, could be placed in the same position, he decided to call

Mr. McHenry to alert him of this possibility and for "a sanity check ... to check my facts." The Complainant stated that during the course of this conversation, which occurred on January 3, he related to Mr. McHenry his conversation wherein "the attorney had suggested to me, or had told me that he would listen to Mr. McDonald's testimony on the stand, he would get back to me so that I could change my testimony accordingly." (T-101).

Mr. McHenry recalled having a conversation with the Complainant on January 3, 1989 wherein they discussed their meetings with Mr. McDonald concerning Mr. Yunker and Mr. Fuchko and the staffing procedure for the SONOPCO project. Mr. McHenry was not examined at the hearing regarding whether the Claimant had related any conversation with an attorney about changing testimony. In an affidavit concerning the January 3, 1989 conversation, prepared during a meeting with the Complainant on or about July 16, 1990 (T-294) and submitted into evidence at the November 13, 1990 session, Mr. McHenry stated, in part:

> Mr. Hobby stated to me that, at the conclusion of this planning meeting, an attorney from Troutman/Sanders had told him that his explanation of trying to terminate Messrs. Fuchko and Yunker in the April-June, 1988 time period did not square with Mr. McDonald's recollection and that the Company had a problem with this conflict in testimony. Mr. Hobby told me that he told the attorney that the Company had bigger problems in that Mr. McDonald's statements related to the selection of personnel were incorrect. Mr. Hobby said he explained the discrepancies to the attorney and the attorney responded that he would listen to what Mr. McDonald said on the stand so that Mr. Hobby could change his testimony to agree with Mr. McDonald's. Mr. Hobby said he refused.

(CX 39)

On cross-examination the Complainant admitted that he had no direct evidence that the inconsistences of testimony that he had raised had ever been communicated to Mr. McDonald by the attorneys involved but that he believed that they did based on his experience with the law firm. He acknowledged further that neither Mr. McDonald nor any other company official had said anything to him about the issue of inconsistent testimony. (T-230-232).

The Complainant was never called to testify at the Fuchko/Yunker hearing as the matter was settled after the Respondent's had put on two or three witnesses, including Mr. McDonald. (T-762)

The Complainant testified also that he next saw Mr. McDonald early in the morning of January 3, 1989 when he was asked to come to his office. He described what transpired at the meeting as follows:

> Mr. McDonald told me he wanted me to do something for him, which I agreed to do. I did tell him -- whatever it was was a little bit out of the ordinary, and I don't remember what it was he asked me to do, but I told him that I would like -- I'd be glad to do it, but I needed to check with my boss, George Head.
>
> He asked me what I was talking about, and I said that Mr. Dahlberg had established a group to interface with -- it was an interface between Georgia Power Company and the SONOPCO project in Birmingham, and I told him I had been named general manager of NOCA and that I now reported to Mr. Head, and Mr. McDonald told me that he didn't want -- he said "Don't have any part of that, I'm not going to have any part of it. If I decide that job is necessary or is needed in the future, I will pick the people who head it up. Don't you get involved with that."

(T-104-105)

Mr. McDonald had no recollection of any such conversation. (T-618).

On January 6, 1989, T.G. Boren, a Georgia Power senior vice-president, addressed a memorandum to the Complainant in which he proposed transferring responsibility for nine miscellaneous nuclear activities, including "Nuclear Performance Indicators" to his newly created organization (CX 11; RX 5). The Complainant testified and his phone log (CX 12) indicates that he discussed the memo with Mr. McDonald on January 19 and that he disapproved of it totally. He continued in this regard that Mr. Boren subsequently talked to Mr. McDonald about the memo and repeated that Mr. McDonald expressed great concern over assigning him those responsibilities. Mr. Boren testified that Mr. McDonald never asked that the Complainant be relieved of these responsibilites (T-479).

On or about January 27, 1989, Mr. Head decided that the Complainant's new position should be rated at level 20, a two step increase over his previous position. His salary was increased accordingly from $95,000 to $103,104 per year, with a bonus of about 20%. (CX 14).

The Complainant testified in detail concerning problems he experienced in March and April 1989 obtaining cooperation from SONOPCO in general and Mr. McDonald in particular. His testimony in this regard is, in effect, summarized in the following confidential memorandum, dated April 27, 1989, addressed to Mr. Fred Williams, a Georgia Power Vice-President, and signed by the Complainant and Mr. George Head:

> Following is a list of problem areas in Nuclear Operations that you requested.
>
> 1. Responsibility as Agent: There is no clearly defined person responsible for acting as agent for the Joint Owners. I serve on the Joint Subcommittee for Power Generation (and am currently serving as Chairman) and deal with their Nuclear Operations people probably more than anyone else. However, you are involved, several of your people are involved and others.
>
> It was my understanding when we tried to negotiate a contract between GPC and SONOPCO and amend the contract between GPC and Joint Owners, that I would act as OPC's (for example) agent, working for George Head, and that all interactions on nuclear matters between GPC and OPC would come through me with the exception of some specific, routine reports that would be provided directly from SONOPCO to all owners. I am prepared to handle that.
>
> Yet, on Friday, April 21, I received a call from John Meier stating that the SONOPCO Project was establishing a Quarterly Review Meeting with GPC's Joint Owners to discuss Nuclear Operations. John asked if that meeting could replace the Joint Committee or Subcommittee. I said no.
> On Tuesday, April 25, Dan Smith from OPC called to say they had been contacted by John Meier and OPC wanted to know who was setting up this Quarterly Review Meeting, its purpose, and why

I was not included. He said Oglethorpe was confused as to what is going on and who was in charge.

While I know that there are significant differences between GPC and OPC on a number of matters, the relationship between us in nuclear is excellent. If GPC could get a handle on SONOPCO and, if nuclear could be separated from these other issues, I believe Dan Smith and I could work out all of the problems in nuclear.

2. Communications: On January 19, Pat McDonald called to say he was developing an E mail system to connect all Joint Owners -- including GPC. One of its purposes was to provide daily reports to each Joint Owner on the status of our plants. He asked me to contact Roy Barron to work out details. I did.

On Monday, March 13 (I believe that was the date), Roy Barron told me that the system was ready to do a test run and all he needed was to get Pat McDonald's approval. I called Pat to ask for his approval but he was out of town in Florida. I asked his secretary to ask him if it were okay when he called in. She called back on March 15 to say she had been unable to ask him.

I talked with Pat on Tuesday, March 21, and he said the system wasn't ready.

We are still not connected. I get no information from SONOPCO on the status of our units. I get all of my information (except monthly summaries three weeks after the end of the month) from Oglethorpe Power. I get daily reports from them.

Secondly, we have been limited by Pat McDonald to talking to only one person at the SONOPCO Project -- first it was Bob Gilbert, who delegated it to Marv Brown, who delegated it to Tim Marvin. This process has worked fairly well on routine data requests but on non-routine items, it has been an impediment.

As an example, I was alerted that we were to receive an update of the draft TAC on Nuclear Operations during the week of April 10 - 14. The responsibility for that report, its review, and rebuttal testimony had been assigned to me. Art Domby had been helping me. Early during that week, Art called Tom Beckham and Ken McCoy and had told them that, when he received the report, we would need technical assistance -- in a short time frame -- in reviewing the report and in preparing for a meeting with the PSC.

Friday, about noon, April 14, I received the report and Art asked me to call McCoy and Beckham to alert them we needed the technical assistance on Monday, April 17, and the meeting with PSC staff and consultants would be held on April 19. My discussions with Beckham went well -- he was very cooperative. McCoy said he didn't know what I was talking about and said he hadn't talked to Domby in weeks. Domby remembers his call because he had to have McCoy tracked down at Plant Vogtle.

I don't know what happened in Birmingham. I received a call from Tim Marvin raising hell that Art and I had called a Vice President. McDonald called a meeting. I received a call from Dwight Evans who said McDonald was irate and I had been taken off the TAC report. I was later told, though I can't prove it to be true, that the Vice Presidents of Georgia Power on the SONOPCO Project were told they could not talk to me or Art Domby.

In Mr. Dahlberg's memo of December 27, he stated that the interface at Georgia Power with the Nuclear Operations group in Birmingham would be George Head and me (see Attachment A). The interface we have had with them, except for routine data requests, has been negligible. In fact, it has been prohibited.

Yet, SONOPCO Project personnel are not so inhibited. See memo (Attachment B) from Bob Gilbert dated April 20, 1989. Note that George Head and I were not copied on the memo.

In discussing the establishment of Nuclear Operations Contract Administration, I was told that Mr. Head and I would review and approve the SONOPCO Project budget. However, Grant Mitchell of Corporate and Financial Planning at SONOPCO doesn't agree. See page 3 of memo (Attachment C) from G. Mitchell dated April 20 1989. Neither George Head or I received a copy but it is in direct conflict with what the President of GPC has stated. It is also in conflict with what SONOPCO agreed with the Joint Owners. I also found that first paragraph on page 1 of that memo interesting. Had Georgia Power personnel sent out these two memos, SONOPCO would have raised hell.

3. Interfering with Other PCO Functions: When I was first named to this job, we had a meeting in which I was assigned by executive management certain responsibilities.

   Since then, Mr. McDonald has objected to several of these assignments and I have been removed from meetings or relieved of responsibilities, not because GPC management agreed, but in order to get cooperation from SONOPCO.

   What we need is for SONOPCO to support us and cooperate with us and allow Georgia Power management the right to determine who does what. Our management and other GPC people will be held accountable for our regulatory affairs effort. We need SONOPCO's support and then let us do our jobs. Unfortunately in several examples, Mr. McDonald has interjected himself into directions of other company functions and support from SONOPCO appears to hinge on his getting his way.

4. Staffing: When we established NOCA, I told George Head we needed a manager, secretary, two accountants, and two performance engineers. He agreed to start out with one accountant and one performance engineer and revisit the staffing level as the work load increased. We later added another accountant.

Back in January, I called Ken McCoy to ask if I could talk to Mike Barker about the performance engineer job. Mike had done a similar job for me prior to going to Birmingham and was well qualified. Ken asked if it were a promotion. I said I had not had the job evaluated yet and didn't know. He said if it were a promotion, SONOPCO would not object.

I had a job description done by Personnel and it was determined to be a level 13 job -- one promotion for Mike Barker. Mr. Head approved the job description at that level.

I told George Hairston about this in the GPC cafeteria later and relayed my conversation with McCoy, but he would not give me permission to talk to Mike Barker. I called the Administration people at SONOPCO and asked what the rules were. They said they were told if it were a promotion, management would give its permission.

After talking with George Head, we posted the job. I selected the best three candidates and they were all from SONOPCO -- which is not surprising. Our Personnel department was told the request to interview had been approved all the way up to George Hairston. But, there it stopped. Later, our Personnel department was told Mr. McDonald would not approve the request because he didn't agree that the job level should be a 13! Although GPC Personnel department and a Senior Vice President at GPC had approved the position, Mr. McDonald has held up this request and I have not been allowed to interview these three gentlemen.

I need the expertise the performance engineer would bring and the lack of support from Mr. McDonald is impacting my ability to get the job done.

5. Cooperation: I served on Phase I of the SONOPCO Task Force and was, and am, a real supporter of the Operating Company concept. In our discussion, Bob Buettner, an attorney with Balsh and Bingham and now a Vice President at Alabama, said Mr. Farley was concerned that once this operating

company was established, we would wind up with a group of arrogant, technically trained elitists that the operating companies would have no control over. I now respect Mr. Farley's concern more than I did two years ago.

It takes one to operate -- two to cooperate. I know that most people at Georgia Power want to cooperate with SONOPCO and want it to be a success for GPC and the System. But, there are great concerns by many people.

A significant concern that a lot of people have is who does Mr. McDonald work for. I have heard discussions on that at high levels in the Company. It is a very important question because the operating licenses for Hatch and Vogtle are in GPC's name; for Farley, APC. I am not a lawyer or licensing specialist, but I believe both will tell you that it is essential that GPC and APC be in control of these plants. Oglethorpe Power is so concerned that it has formally requested confirmation that Mr. McDonald receives his management direction from and reports to Mr. Dahlberg. If that is not the case, we are in violation of our license and could experience some significant repercussions from the NRC -- including the revocation of the licenses.

Oglethorpe is very concerned about this issue and they feel NRC is concerned. A Region II NRC employee suggested to Oglethorpe that NRC was so concerned that they might seek to put a resident inspector in Birmingham to see what was going on.

In establishing an Operating Company, the System, among other things, sought to open up the opportunity for us to run other utilities' power plants under contract. We should now be operating in that mode -- subject to meeting license conditions. There are some possibilities in the industry now and we ought to be giving serious considerations to how we operate now so that, should we get through the legal hurdles and be given permission to expand outside our service area, we will be ready to aggressively pursue these opportunities. But, I really doubt any utility would be interested in contracting with SONCPCO if their experience

> with the contractor was going to be similar to Georgia Power's Fred, there are other issues relative to SONOPCO, important to the System, that needs to be addressed. I have asked repeatedly for an opportunity to discuss these with senior management. I hope we will get that opportunity soon and can work toward a more cooperative relationship with SONOPCO.

In regard to the Complainant's not being able to interview Mike Barker, testimony was elicited from Lee Glen, Georgia Power's Manager/Corporate Concerns, and William R. Evans, a Georgia Power Corporate Concerns Coordinator, which was to the combined effect that a complaint had been filed with their department because of the inability to transfer from a SONOPCO position by an employee, other than Mike Barker. (T-509-540) Following an investigation which included an interview with the Complainant about the similar problem he was having, a "white paper" was prepared by Mr. Evans, with the following "Investigation Results":

> "Transfer denial applies to all nuclear employees who wish to accept a position for which a job slot must be transferred from Nuclear Operations to fill an early retirement job opening. Slots may become available after finalization of SONOPCO staffing plans."

(CX 20)

Mr. Barker was called as a witness and testified that after he became "frustrated" at not having been granted an interview for the NOCA position, he, telephoned Mr. Dahlberg on June 28, 1989, during one of his "Dial Dahlberg" sessions. This was a program where anyone in the company could call Mr. Dahlberg during a specific period and voice any concerns they may have. After Mr. Barker related the difficulty he was experiencing in attempting to transfer to NOCA, he was told by Mr. Dahlberg that "he had put that job on hold." Mr. Dahlberg reportedly stated that his reason for doing so was that if the SONOPCO Project works as they envision it, there would be no need for NOCA and he did not want to transfer Mr. Barker when there might not be a position for him in a couple of months. (T-908-911)

In regard to the reporting issue, the record also includes the following memorandum, submitted into evidence by the Respondent, from the Complainant to Mr. Williams under the date of April 26, 1989:

> At the April 19 Subcommittee for Power Generation meeting, Mr. Dan Smith requested a response to the following. The wording is taken from the minutes exactly as Dan stated.
>
> "Dan Smith requested that Oglethorpe be provided an organization presentation by SONOPCO on the reporting chain up through the Board of Directors for Mr. George Hairston, Mr. R. P. McDonald, Mr. Joe Farley. He specifically asked how Mr. Farley fits into the picture and who he reports to up through the Board."
>
> As we discussed, I am forwarding the question to you for reply.

(RX-1)

Dan Howard Smith, Program Director of Power Production of Oglethorpe Power Corporation, testified that a question arose in his mind as to whether Georgia Power was really in charge of the nuclear plants. This had to do with Mr. McDonald's and other executives' being "triple headed." He explained this as follows:

> They are employed as Georgia Power, SONOPCO and Alabama Power which means that they work for all three companies simultaneously. This is a very difficult situation to be put in. It is very hard to make that work, in fact.
>
> The issue and question here is Mr. Dahlberg, who is CEO of Georgia Power, really have direct control over Mr. McDonald who wears three hats who has control over Mr. Harrison who wears three hats who has control over Mr. Beckham and Mr. Farley, et cetera.
>
> Or at any given time, who really is in charge of the nuclear plants? Is there a direct chain of command to Mr. Dahlberg. That was the question that came up in my mind because I have a responsibility for looking after my company's interest and I wanted to ensure that the arrangement that we were operating with was, in fact, legal and that the NRC agreed that it was legal. So I raised the issue.

(T-850-851)

When asked whether anyone at NRC had ever raised such concern with him, Mr. Smith responded:

> One evening after work, several of my associates and I were at the Bradbury Hotel in Tucker, Georgia. By chance, John Rogge, who is the chief resident inspector at the Vogel nuclear plant, happened to be staying there attending some type of NRC project. We were having a drink together essentially. John Rogge made the comment to no one in particular but to our group that the NRC was having trouble figuring out who was in charge at Plant Vogel, I assumed. (T-853)

There was no discussion with Mr. Rogge on the subject. Mr. Smith related the conversation to the Complainant and had raised the reporting issue with him at other times. The Complainant was non-committal.

As for his reasons for preparing the April 27, 1989 memo the Complainant testified:

> In April -- in February, March and April of 1989 we had continued to have problems in getting cooperation from Mr. McDonald. I had discussed them with my boss upstairs.
>
> We were sort of -- we had sort of a list of problems that needed to be addressed, Mr. Head had talked to Mr. Dahlberg about them several times.
>
> Mr. Head told me that in one of his conversations with Mr. Dahlberg that Mr. Dahlberg said that he was going to go and discuss these with Mr. Farley and see if we couldn't get some resolution to them.
>
> At about the same time Mr. Fred Williams called me and said that Mr. Dahlberg had asked him to develop a list of some of the problem areas between Georgia Power Company and SONOPCO, and that Mr. Dahlberg was going to talk to Mr. Farley about them, that Mr. Baker and Mr. Dahlberg were going to discuss them with Mr. Farley.
>
> Mr. William asked me if I would prepare for him a listing of the problem areas that my group was having with SONOPCO. I wrote this memo. As I

said, Mr. Head and I had been discussing this many times, the problem!!!
(T-147-148)

The Complainant stated that he took the memo to Mr. Head, who "felt very strongly about the issues" contained therein and stated that he would sign the memo. (T-149). Mr. Head testified that the Complainant had raised the issue on several occasions of lack of cooperation by SONOPCO. He was shown the memorandum early in the morning of April 27, 1989, which was the day prior to his retirement from the company, and he signed it because he "thought it would help Marvin in resolving some of these issues." (T-674). He did not consider that the memorandum raised a regulatory concern because he "was very well aware that [Mr. McDonald] reported to the president of the company." (T-648).

The Complainant went on to testify that he hand delivered the memo to Mr. Williams after Mr. Head had signed it. Mr. Williams reportedly took the memo, read it, turned to him, and said he should destroy all copies of it as they could not have the memo in their files. The Complainant responded to Mr. Williams that he "was raising a regulatory concern and he should not tell me to destroy all copies." He continued that he and Mr. Williams talked for a few minutes about the organizational set-up and Mr. William's understanding that the NRC had been briefed on the SONOPCO concept and would be shown the organizational chart if anybody at NRC raised a concern. They discussed also Mr. Williams' views as to why Mr. Dahlberg "didn't just pick up the phone and tell Mr. McDonald what to do." (T-153). The Complainant stated that Mr. Williams then handed me back the original, but kept a copy. He told me that he was going to Birmingham the next day and he was going to discuss some of the problems with the people at SONOPCO, but he assured me that he was not going to give them a copy of the memo that he kept, and he said he would not retain that copy in his files. (T-152). The Complainant testified that he reported his conversation with Mr. Williams to Mr. Head, who told him to destroy copies of the memo but retain the original. Mr. Head did not recall such a conversation.

Mr. Williams testified that he did not ask the Complainant to prepare the April 27 memo for use by Mr. Dahlberg in a meeting he was to have with Mr. Farley. What he did request was a memorandum concerning the relationship between Georgia Power and SONOPCO such as who contacted who and which departments interfaced. This was for his use as the primary negotiator with Oglethorpe Power. After quickly reading the memo on April 27, he

determined that it was not responsive to what he had asked Complainant to do and that it contained inaccuracies. He continued:

> "My management philosophy was one if I had a problem with somebody I would go talk to him, we didn't need to just start writing a bunch of memos around and saying we've got problems here and everywhere, go sit down and talk about it.
>
> Therefore, with the other inaccuracies that I had already pointed out, or what I saw as no problems at all in the memo that he was raising after my explanation to him I hoped that answered him that if I was him I would -- I asked him to go back -- not if I was him, I asked him to go back and consider whether he wanted to send the memo forward." (T-416)

Mr. Williams recalled retaining a copy of the memo in order to read it in more detail. He believed that he showed the copy to his assistant, "because a lot of the areas were more as I saw personal concerns of Mr. Hobby, or frustrations or gripes that he wasn't included on some memos and all, or invited to some meetings or wasn't informed or had communications go through him to co-owners." (T-418). He had a routine meeting with Mr. Dahlberg a day or two later to apprise him of what was going on in the negotiations. He did not recall whether he showed a copy of the memo or just talked to him about some concerns the Complainant was raising. He informed Mr. Dahlberg that he thought we could work those things out through negotiations and through the structuring of the company. He did not think "Mr. Dahlberg was concerned with that." (T-418). Mr. Williams returned the copy of the memo to the Complainant within a day or two. (T-455) Mr. Dahlberg testified that he first saw the April 27, 1989 memo when he gave his deposition in regard to the instant matter (T-314).

The Complainant testified that he had further conversations with Mr. Williams about the memo on April 28 when he called Mr. Williams at home to find out how his meeting went in Birmingham that day. Mr. Williams reportedly stated that he had apprised Mr. Bob Edwards of the law firm about the memo, that he was going to rewrite the memo, and that the Complainant was to destroy the original. The Complainant's telephone log for that day pertaining to a 1550 call to Mr. Williams includes the notations:

"-Edwards worried about memo
-Williams will rewrite memo-
get rid of orig"

(CX-12)

Mr. Williams did not specifically recall discussing the April 27 memo with Mr. Edwards although he may have mentioned to him that the Complainant had written him "something." (T-470). Mr. Edwards testified that Mr. Williams mentioned the memo to him on a trip either to or from Birmingham. He related their discussion as follows:

> Yes, and the conversation really wasn't about the memo. He wasn't describing, going into detail about the memo. It was very a offhand conversation about the scene of Marvin Hobby showing him this thing and kind of -- it was -- he was kind of disappointed with Marvin Hobby, but it wasn't the details of the memo.

(T-780)

Mr. Edwards continued that he did not see the memo until his deposition was taken in the instant matter. He did not tell Mr. Williams that he was concerned about the memo or to have it destroyed.

Mr. Williams testified further that he did not consider the Complainant's concerns relating to the reporting structure to be a significant regulatory concern or potential license violation regarding Georgia Power's nuclear plants as he was of the opinion that Mr. McDonald received his management direction regarding the Hatch and Vogtle plants from Mr. Dahlberg.

Mr. Farley was questioned about a May 5, 1989 meeting he had with Mr. Dahlberg. It was a luncheon meeting held while the witness was in Atlanta for another purpose. The major part of their discussion centered on the progress of the negotiations with the co-owners about the SEC approval process. They also discussed a proposal for adding one or more job authorizations for the NOCA group. Mr. Farley stated that he expressed the following opinion as that time:

> It was my opinion then, and still is that if the Southern system is to achieve the economies and the management approach that was desired in the formation of a Southern Nuclear Operating Company group that it would be an unnecessary expense and a duplication to set up a group that would oversee and overview the decisions that were being made by the nuclear operating group.

> This is a problem that The Southern Company, and I presume other organizations tend to have in that if you assign responsibility to a group, and then you set up another group to oversee whether that group is doing it properly, then you wind up with duplication, you wind up with an adversarial relationship, and if you don't like the way that the group is doing its work you ought to get another group, but don't set up competing groups.
>
> We have had experience with this within the Southern system on other areas, and I expressed the view that we would simply be adding people in a duplicative role, and that if Georgia Power or Alabama Power for that matter were not satisfied with the staffing, then we ought to change the staffing, but let's not duplicate it.
>
> That was in general the opinion that I expressed. (T-570-571)

Mr. Farley testified further that he was not shown the April 27 memo at the meeting and was not aware of the same or the Complainant's concern, about to whom Mr. McDonald reported, until the commencement of the instant proceeding.

Mr. Dahlberg recalled a luncheon meeting with Mr. Farley on or about May 5. The principal discussion concerned the status of the negotiations with Oglethorpe. Neither the Complainant's April 27 memo nor his concern, as to whom Mr. McDonald reported, was discussed. Although he was not certain it was during this meeting, Mr. Dahlberg did recall briefly discussing NOPC with Mr. Farley on one occasion. Mr. Farley expressed the opinion at that time that the group was "a duplication of effort." (T-320)

Mr. Barker testified that Mr. Williams had mentioned the April 27 memorandum to him sometime later but he was unable to show him a copy and the only time he ever saw the memorandum was after the commencement of these proceedings (T-682-683). He testified further that the Complainant had told him a number of times that he couldn't get cooperation from SONOPCO. Mr. Barker's view of such complaints was that its the Complainant's "job was to establish a relationship with SONOPCO." (T-700)

On May 15, 1989 Mr. Williams sent the following memorandum to the Complainant:

> In response to your questions in your letter of April 26, 1989, I have the following reply.
>
> Mr. R. P. McDonald reports to A. W. Dahlberg for operation and support activities of Plants Vogtle and Hatch. I have attached a copy of the most recent published organization chart showing the reporting. Mr. George Hairston reports to Mr. McDonald.
>
> Mr. J. M. Farley, Executive Vice President - Nuclear, provides services relating to the anticipated transfer of nuclear operating and support activities from George Power Company to the Southern Nuclear Operating Company. These services include the compliance with applicable regulatory requirements and for nuclear support on an industry basis.

(RX 14)

Mr. Williams testified that he prepared the memo so that this information could be relayed to Mr. Smith. The Complainant stated that he delivered the same with the accompanying organizational chart at a May subcommittee meeting to Mr. Smith's representative, David Self, who did not consider it to be an adequate response. Mr. Smith testified that he accepted the response in resolution of the question he had raised and he did not bring up the issue again. (T-886-887)

When asked whether he sought advice from anyone after he was told to destroy the April 27 memo, the Complainant responded:

> I was concerned that I thought I had brought up a regulatory issue, a regulatory concern to the company, and I was concerned that since I had expressed it in writing to the company that I might have a legal obligation to inform the NRC, but I wasn't sure.
>
> I talked to Morris Howard who was a former regional administrator of the NRC, I asked him what the rules stated. I also got a copy of the Code of Federal Regulations and read them to determine if I had a liability in not telling the NRC.
>
> I did not get an answer that I felt comfortable with, I didn't know what the answer was, so on June the 8th, a month later, I wrote to Admiral

> Wilkinson. I expressed to him my concern of what had happened. I told him the events that had happened, I expressed my concern, and I told him that I wanted to talk with him that weekend to seek his advice.

(T-156-157)

The 6 + page letter of June 8, 1989 to Admiral Wilkinson is of record (CX 22). After generally praising Mr. Miller's and Mr. Head's performance when they were president and a vice-president of Georgia Power, critizing the performance of Messrs. Barker, McDonald and Dahlberg, noting they were "in a heavily political arena here," and relating the problems he was experiencing in managing his department, the Complainant concludes the letter:

> I believe that the outcome will be that my job will be greatly reduced including a reduction in pay and I will be asked to report to Fred Williams. Or, I could be asked to resign. I don't know. But, I do know this, I have tried to do a good job and have been prohibited from doing my job by Pat McDonald. I got excellent support from George Head. I have received no support - - except lip service - from Grady or Dahlberg. Everybody is protecting their own position in the company.
>
> I don't know what will happen. It is my opinion that GPC and Alabama Power Company are in violation of our NRC licenses. McDonald reports to Joe Farley, I don't care what the organization chart says. I have pointed out over and over to management that I was concerned that we were violating Federal law. But, the answer is time and time again, "We'll show them an organization chart."
>
> Maybe you and I can talk about this on Sunday.

A copy of the April 27 memo was enclosed with the letter. Admiral Wilkinson testified that during their subsequent telephone conversation, the Complainant expressed concern as to whether he had a legal obligation to report what he considered to be a licensing violation to the NRC. In response to the question as to whether he had given the Complainant advice in this regard, Admiral Wilkinson testified:

> As a matter of fact, I advised Mr. Hobby that I was not a legal or licensing expert, and that in my personal opinion he did not have a legal obligation to report to the Nuclear Regulatory Commission because in my opinion there wasn't an immediate safety concern involved, he wasn't a company officer, that in my opinion such matters be handled within the organization.
>
> I advised him that he should resolve the matter within the line management of Georgia Power and the co-owners.

Testimony was adduced regarding the development of alternate "performance standards" for the operation of Georgia Power Company's nuclear power plants. This activity was related to a matter pending before the Georgia Public Service Commission and the belief that the commission was prepared to impose such standards on Georgia Power. Dwight H. Evans, an Executive Vice-President of Georgia Power, testified:

> "I had overall responsibility for the rate case. We agreed that performance standards were not desirable for the operation of a particular plant, that the entire company should be judged in a rate case.
>
> However, late in the rate case after our direct case it became apparent to me that the Public Service Commission was going to adopt performance standards, and that we should be prepared to comment on the performance standards that they were about to enter into testimony.
>
> Mr. McDonald did not agree, and since he and I both were executive vice president of the company, we took that to our boss, Mr. Bill Dahlberg, and he resolved the issue."

(T-366)

Mr. Evans continued that he and Mr. McDonald met with Mr. Dahlberg and attorney Joiner. After they both stated their cases, Mr. Dahlberg concluded that they should submit testimony and instructed Mr. McDonald to do so. Mr. McDonald carried out these wishes and the testimony was submitted. (T-367) Mr. McDonald testified to the same effect (T-607-608) as did Mr. Dahlberg (T-337-338). The Complainant testified that he had been

told by Dwight Evans that the conversation at the meeting got quite heated and Mr. Dahlberg "really chewed McDonald out." (T-168).

The Complainant and Dan Howard Smith testified to the combined effect that from August to November 1989 they met two to three times per week, with the respective permission of Grady Baker and Tom Kilgore, Vice-President of Oglethorpe Power, for the purpose of attempting to work-out a Nuclear Managing Board agreement. They were instructed to do so confidentially so that no one at SONOPCO was aware of their activities in this regard. They concluded a draft agreement which was subsequently presented by Oglethorpe to Georgia Power.

Mr. Boren testified concerning a Management Counsel meeting on November 7, 1989 attended by Mr. Dahlberg, himself, the other three senior vice presidents, and three of the four executive vice-presidents. Mr. McDonald was not included. When asked to explain the purpose of this meeting, Mr. Boren responded:

> The purpose was several things, but the primary purpose was to look at leadership.
>
> The Southern system, of which Georgia Power is a big part, was going through the process of looking at how do we ensure that we have the right number and quantity and type of leaders in the pipeline so to speak for the next decade, and one of the challenges they had issued to Mr. Dahlberg was to look at people that he had coming up through the ranks and make sure we identified those leaders, looked at their potential and were basically trying to develop that.
>
> Also at the same time Mr. Dahlberg was doing some team building with us as well.

(T-483)

And when asked what the Complainant's performance and potential evaluations were, he answered:

> Let me describe the process we went through on that if you would.
>
> Each of us stood up before the rest of the members of the management council, and we would list the individuals that reported directly to

> us, and then before anybody else commented on them we would sit down and identify what we thought their performance was from a rating of zero to four, zero being the lowest, four being the highest, and what we thought their potential was, and that basically went from zero to three I think, zero being peaked out, no further potential one being could move one more level, two being could move two more levels.
>
> In that particular assessment Mr. Hobby had three what we call double zeros, three two zeros and one one-zero. In other words, in terms of potential everyone rated him as having no further potential.
>
> In terms of performance, three out of the seven people rated him at the lowest level possible, that's zero; one person rated him at one, and three people, four people rated him at level 2 which was basically about average.

(T-483-484)

Messrs. Dahlberg's and Evan's recollections of this meeting were also to the effect that the Complainant was rated as having no potential with the company.

The Complainant testified that Mr. Smith called him on November 15, 1989 and requested that they meet for breakfast the next morning. He continued:

> When we sat down at breakfast on the 16th of November Mr. Smith said that he had been told by his boss that Mr. Williams had been out to Oglethorpe, Mr. Williams had talked with Oglethorpe, and that we needed to hurry up and conclude our negotiations because as soon as our negotiations were concluded that I would be removed from my job at Georgia Power Company.

(T-185)

When asked how he reacted to this news, the Complainant replied that he was "very surprised, very shocked." (T-185)

Mr. Smith testified that he relayed this information to the Complainant mainly because his boss, Tom Kilgore, asked him to let the Complainant know that he thought the Complainant would be terminated following work on the Managing Board agreement. (T-861)

Mr. Williams testified that he had not told Mr. Kilgore that he was going to eliminate the Complainant's position. He did express to him during a negotiating session that he did not believe there was a need for expertise in the nuclear operating area on staff at Georgia Power Company. He testified further that since about the Spring of 1989 he had been giving some thought as to the need for the NOCA group and how it would fit in with the new relationship that they were negotiating. At that time he was "still very open-minded because we were still in the very early stages of negotiations at that point as to what we would need..." (T-408) He had conversations with Mr. Baker before his retirement about the need for the organization. He had also talked to the Complainant about the necessity for the group and invited his views as to what its function should be. Mr. Williams reached the conclusion after talking to the Complainant and his people, accounting staffs and SONOPCO people other than Mr. Farley and Mr. McDonald, that there was no need for a separate organization. In early November and in December, he informed Mr. Evans that "he did not see the need for a high level manager nor did he see the need for a separate organization to exist to administer a contract if we ever got a contract."

Mr. Dwight Evans testified that he was an employee of Southern Company Services when NOCA group was formed. After joining Georgia Power as a vice-president, he developed the following opinion about the necessity for NOCA:

> I believed that we should have multiple points of interface with the new company, that as an example I was responsible among other things for interfacing with the Public Service Commission.
>
> I felt like that the accounting organization at Georgia Power that presented testimony, presented information to the Public Service Commission should have direct access to people at SONOPCO, and all across the board.
>
> I felt like we did not need a high level position to interface with SONOPCO, that we should interface with them in many ways similar that we do with the service company where we have many people dealing and more lines of communication.

(T-369)

When asked whether he had ever discussed this opinion with Mr. Williams, Mr. Evans replied:

> I did later in the year. Due to a retirement of an executive I knew that there would be reorganization and Mr. Williams would begin reporting to me at the end of the year, and there would be changes taking place, so that in late 1989 after the rate case, probably in the late October-November time frame, we began having discussions as to how we should organize and proceed.

(T-369)

Mr. Boren testified that the decision to eliminate the position of general manager of NOCA was discussed with him by Messrs. Williams and Evans. He stated the following reasons for eliminating the position:

> When we established the position back at the end of 1988 -- I believe it was the end of '88, it may have been the beginning -- we did that on the assumption that we would have a contract for this manager to administer.
>
> Here we are almost 1990, the contract has not come about, and we've realized that the reason we established the job just wasn't there, and that's the primary reason that we were looking at eliminating the job, and the other miscellaneous requirements for the job were kind of being handled through the other normal functions of the company.

(T-485-486)

The Claimant went on to testify that in late November, Mr. Williams called him to his office to inquire about the status of the negotiations with Mr. Smith. The following conversation occurred at that time:

> After Mr. Smith had told me that as soon as the negotiations were concluded, that we needed to hurry up and complete the negotiations, Mr. Smith -- excuse me -- Mr. Williams called me to his office in late November, I don't remember the exact date, and he asked me for a status on the negotiations.
>
> "I told him what the status was, and I told him that I needed to bring something to his attention, and I said "I had breakfast with Dan Smith and he told me the following, and I want to know if this

> is true or not," and Mr. Williams said that it was true, that when the negotiations were concluded that I would be removed from my job.
>
> I asked him why, he told me it was because Mr. McDonald and Mr. Farley did not want any nuclear experience at Georgia Power Company, period.
>
> He told me overall it was not personal related to me, but there was a personal problem relative to Mr. McDonald with me, and we discussed it for a couple of minutes, and I asked him what was the company saying, and I asked Mr. Williams point-blank was he saying that the company was going to offer me a package to leave Georgia Power Company, and he asked me how much would it take.
>
> I told him I'd have to think about it because, quite honestly, you can hear a lot of different things and you don't know whether they're true. I was surprised that Mr. Williams told me that what Mr. Smith had told me was true."

(T-189-190)

Mr. Williams testified that he initially inquired as to whether the Complainant would be interested in a job at SONOPCO or another position with Georgia Power Company within one or two levels. It was after the Complainant rejected both of these options that Mr. Williams inquired whether he would be interested in some kind of outplacement.

Testimony of the Complainant and Mr. Williams is to the combined effect that they began discussing an outplacement package at lunch in December 1989. Mr. Williams indicated at the beginning of these discussions that there might need to be a non-compete agreement for perhaps 3 to 5 years. The Complainant had desires to attend medical school. He would need to take some additional undergraduate courses in order to meet medical school requirements. He proposed at first that he should be given two years pay with bonus in a lump sum, six years' full salary, his company car and his computer. He later reduced his proposal to one year salary in lump sum and two-thirds of his pay for six years.

Dwight Evans testified that he provided information at a Management Council meeting in late December 1989 that he felt the need to eliminate three positions from his organization, two vice-presidents' and the Complainant's.

Mr. Dahlberg testified that he believed that the recommendation to eliminate the position of general manager of NOCA come from Mr. Evans or Mr. Williams. When asked whether he knew the reasons for the decision, he responded:

> Yes. There was not a function to be performed. There was no contract, and I had determined that the other things that I saw could be performed by that group, that is a monitoring of performance wasn't necessary and that SONOPCO did that themselves.
>
> The same thing happens in the fossil and hydro. I don't have, for example, a separate organization that looks at the performance of that group, they do it themselves, and there just wasn't a need for that position because there were no functions to perform.

(T-312-313)

Mr. Boren testified that Georgia Power had gone through some major restructuring during the last few years which had resulted in a 10 percent reduction in its staff. He stated the following reasons for this restructuring:

> Those changes have come about because we have completed construction of Plant Vogtle, because of competitive pressures, we haven't gotten the rate relief we wanted from the commission, that sort of thing, and its put a lot of pressure on us to reevaluate the departments to make sure they're serving useful functions and so forth, and to look at what we need to do to improve our operations.

(T-488)

It was Mr. Boren's understanding that that Mr. Williams was responsible for eliminating the position of general manager of NOCA for the reason that there was no contract to administer and the other miscellaneous requirements for the job were "kind of being handled through the other normal functions of the company. (T-486) He stated that the focus of the December 29, 1989 Management Council meeting was to address a division reorganization although the Complainant's position "was on the list" and briefly discussed by Mr. Evans.

Supervision of the Complainant and his group was officially transferred to Mr. Williams as of January 1, 1990. Thereafter, Mr. Williams informed the Complainant that his proposal for an outplacement package was unacceptable. The Company was prepared to offer at that point one week's pay for every year he had worked for the company (14) plus 25 percent of his salary, approximately $25,000, for the next four years. There was a five year no compete clause attached to this offer.

The Complainant was "very surprised" at the offer and decided seek advice concerning the same from Messrs. Miller, Head and Wilkinson. Subsequently, he met with Mr. Boren and Mr. Williams. At that time he was offered the opportunity to stay with the company until August 31 and then be paid one week's pay for every year worked and twenty-five percent of his salary and bonus for the next four years. His company insurance would be paid for him during this period of time. There would be no non-compete provision. The Complainant testified that Messrs. Boren and Williams would not commit themselves as to whether he would be required to do any work through the period ending August 31. Mr. Williams stated that he told the Complainant that they would work it out so that he would have time to attend classes for the pre-med school courses he needed. The Complainant testified that the meeting concluded as follows:

> As I was leaving the room, I turned around and I said "Mr. Williams, what would happen if you and I can't reach agreement on this outplacement package?" He said "If that occurs, we will simply reorganize the company and eliminate your job."
>
> I said "Why? All this time we've been talking about a mutually agreeable separation, what's going on?" He said "After the memo you wrote of April the 27th of last year, you're not going to get any more support from the senior management of Georgia Power Company."
>
> It was just out of the blue, I didn't know what to say. He said that Mr. Dahlberg had discussed -- I don't remember whether he said he took the memo or whether he said he discussed the issues raised in the memo -- he took those to his meeting with Mr. Farley, and he said Mr. Dahlberg got beat up side the head, and he said "After that you're not getting any more support from senior management of Georgia Power Company."

(T-205)

Mr. Williams testified that neither the April 27 memo nor any of the subjects discussed therein was a factor in his decision to eliminate the Complainant's position and "[I]n fact, until he raised the issue here with the Department of Labor I had completely forgotten the memo was ever written." (T-417).

The Complainant contacted an attorney on January 18, 1990. Thereafter, he, in effect, rejected the latest offered outplacement package.

By letter dated February 2, 1990, Mr. Williams informed the Complainant:

> "As a result of a management review of our organization, your position as General Manager, Nuclear Operation Contract Administration and Assistant To, has been eliminated. In connection with the elimination of your position, a program has been established in order to recognize your valuable service with the Company over the years and to minimize any financial hardship which you may have to encounter as a result of the elimination of your position."

The letter goes on to say that the Complainant would not be required to perform any services after April 2, 1990 and would receive benefits consisting of four weeks' pay plus one week's pay for each year of service and insurance coverage for six months. He was requested to respond by March 16, 1990 by signing an agreement containing a release and settlement relating to the elimination of his position (RX-4; CX 30).

The initial complaint, filed with the Department of Labor under the date of February 6, 1990, centered on the April 27, 1989, "confidential" memo as the Complainant's alleged protected activity but noted that he had "engaged in other forms of internal and external whistleblowing activity as well." The amended complaint, filed on February 23, 1990, alleges the following:

> 1. Prior to February 7, 1990, Mr. Hobby's office was located on the northwest corner of the 14th floor of the 333 Piedmont Avenue, N.E., Georgia Power location. On February 2, 1990, Mr. Hobby was informed that his office was to be relocated to the 19th floor of the same building. That move occurred on February 7, 1990. Said relocation constitutes retaliation against Mr. Hobby.

2. On February 19, 1990, Mr. Fred D. Williams stated to Mr. Hobby that "because of the action you have taken", Georgia Power Company was relinquishing Mr. Hobby of his executive parking privileges and was requiring of Mr. Hobby that he turn in his Georgia Power Company Employee Identification Badge. Upon information and belief, Mr. Williams' statement refers to Mr. Hobby's filing a complaint with the Department of Labor and as such constitutes illegal retaliation.

3. As a result of Georgia Power Company's taking of Mr. Hobby's Employee Identification Badge and as a result of the explicit instruction of Mr. Williams, Mr. Hobby was banned from 20 to 24 floors of the Georgia Power Company Corporate Headquarters.

4. On February 23, 1990, Mr. Hobby received his 1989 performance appraisal from Georgia Power Company. The performance appraisal was done by Mr. Fred Williams to whom Mr. Hobby did not report in 1989. Moreover, Mr. Williams' deliberately downgraded Mr. Hobby's performance appraisal.

The Complainant testified that his office had been a Level 20 office of 280 square feet in size while the new office was a poorly furnished Level 12 of 120 square feet.

Mr. Williams offered the following explanation for the complained of actions:

"He was still down -- I moved his -- the rest of the staff we moved up to the 19th floor where I'm located, incorporated the personnel to analysts or performance people and his secretary within to the bulk power marketing services group that already existed.

"Was going to leave Mr. Hobby on the 14th floor in his location down there. He came up one day and wanted discussions or a meeting to talk with me, and he said he was tired, and I asked him why he was tired, and he said because he had been downstairs shredding a lot of documents, nuclear documents out of the safe, which gave me some concern in the situation we were in, 'Why were you shredding these documents?'

'Well, that's all right, you didn't know about it, they were nuclear safeguard documents which, Fred, you didn't have the right to see because you weren't cleared or anything.'

"Well, I got a little concerned with Mr. Hobby being down there, plus somebody had seen him one day in the garage with somebody -- and you've got to understand with the executive garage you come in through a lifting arm, and you get inside the building and you do not have to pass the guard desk, you're in the building there and you can go on up -- who was with Mr. Hobby, they didn't recognize him.

So it was those two issues right there, I got concerned and I told Mr. Hobby I think it would be better if he moved on up to the 19th floor where we were, and that I would give him parking privileges in the manager's lot which was right outside the front door, but you had to go past the guard desk there, and not part in the executive garage any more.

And also since that what you job, I have no assignments for you or anything to do, all I wanted you to do is find another job in the company or whatever, I wanted you to be free to do that, that you only needed to actually come to the 19th floor or the personnel offices on the first, second and third floor where they do this impacted employees looking for jobs. If he wanted to go to another floor, he had just to pick up the phone and call somebody, or in fact probably could walk once you're in the building, "I want you to sign in every day so I'll know when you're in the building and who's with you down there." and so I took his badge up also.

Mr. Williams admitted on cross-examination that he subsequently ascertained that the Complainant had the authority and responsibility to shred certain nuclear documents.

Mr. Boren testified that he had the following role in the decision to change the Complainant's parking privileges and to have him turn in his identification badge:

"I was coming in from the executive garage one day and saw Mr. Hobby leave with several gentlemen that I did not know, and this was about the time that Marvin had already rejected our two proposals and was also rejecting our outplacement package and notified us at least verbally that he was engaging counsel to work with him, and it's been my experience as the senior officer to whom human resources reports that when you get someone in that kind of situation that you wanted to basically control access, entrance and exists to the building, who came, who went, that sort of thing, and by parking in the executive garage he had no -- there was no one to control who went in and who went out.

"By having him park in the managers' lot which is in the front of the building as opposed to inside the building he had to come by the security guards, and if he had any guests with him they had to sign in. The other way they did not have to sign in.

"I thought it was just prudent management from looking at a potential labor problem here to make sure I knew who went and who came.

"I also wanted to make sure that when he left the building that if he left with boxes or anything, and I had no idea if he was or wasn't going to do that, that if he went by the security that they had the authority to stop and as you to show them the boxes. Again, I thought that was just prudent management.

"I called Mr. Williams and expresses a concern about that, and then after talking to him he basically made the change with Mr. Hobby in terms of his parking and restricting access."
(T-496-497)

In regard to the final performance evaluation, the Complainant testified, in substance, that although Mr. Williams had approved his rating one of his subordinates a "5" in accomplishing an assigned task, he was only rated as a "3" for the same. He stated further that as Mr. Williams was not his supervisor during 1989, he should have relied most heavily on input from his prior supervisor, Mr. Adams. He went on to

testify that Mr. Williams had informed him that he had talked to Mr. Adams, Mr. Baker and Mr. Boren before making the performance evaluation. (T-215)

The Complainant was advised on February 23 that it would not be necessary for him to report to work anymore.

Findings of Fact

Based on the foregoing evidence, I reach the following factual findings for the reasons stated:

The Complainant had experience in the nuclear energy area. Upon the establishment of SONOPCO, Mr. McDonald, believing that the Complainant would be valuable to the project, was desirous of having him transfer to SONOPCO. Whether it was because he had already formed his opinion of Mr. McDonald as expressed in his June 1989 letter to Admiral Wilkinson, or whether it was because he did not want to relocate, he declined to transfer. Instead, he designed a job for himself which he could perform at the Atlanta headquarters of Georgia Power, i.e. manager of a nuclear operations contract administration group. He then sold the idea to Mr. Head, whom he respected and with whom he apparently had a good relationship. Mr. Barker reluctantly went along with the idea because he did not have anything else for the Complainant to do. Mr. Dahlberg's approval was based, in part, on his belief that incorporation of SONOPCO would occur within a matter of months.

The meeting in preparation for the Fuchko and Yunker trial occurred six days after the memo establishing NOCA was issued. I find the Complainant's testimony, in regard to his having been told by anybody involved in the proceeding that he would have to change any testimony that he would give in that matter to conform to that of Mr. McDonald, to be totally unbelievable. I fail to see where Respondent's attorneys would even consider having the Complainant testify about the SONOPCO selection process as he was not involved in the same and any testimony he would have given relating thereto would have been nothing more than hearsay. The Complainant is unable to identify the attorney who purportedly approached him with such an incredible request. The two partner attorneys, who conducted the two sessions which the Complainant attended, have denied making such a statement and I consider them to be credible witnesses. There were two other associate attorneys present at the meeting, but the Complainant made no attempt to subpoena them to the hearing. Although he allegedly relayed the purported conversation to Mr. McHenry the next day,

Mr. McHenry was not examined at the hearing in regard thereto and I decline to credit his affidavit, prepared with the Complainant's assistance 1 1/2 years after the purported event.

I find nothing in this record which establishes that anything the Complainant said at the January 2, 1989 meeting upset Mr. McDonald to the end that he retaliated against the Complainant by making it difficult for him to perform his job or otherwise have an effect on its being eliminated. The Complainant can only speculate that Mr. McDonald was ever told that he had raised the issue of inconsistent testimony. Indeed, if Mr. McDonald was angered at anything the Complainant said at the meeting it would seem that he would have expresses his displeasure when they met the next morning. Instead, their meeting apparently began amicably when Mr. McDonald requested the Complainant to do some task for him. Whatever anger Mr. McDonald did express at their meeting developed after he was shown the memo establishing NOCA. Considering that Mr. McDonald had not been consulted about the establishment of NOCA, and considering his philosophy that there was no need for nuclear oversight at Georgia Power headquarters, any dissatisfaction he expressed at the time is quite understandable.

There is nothing in the record that establishes that any of the Respondent's other executives were privy to anything regarding the Complainant that transpired at the January 2, 1989 meeting. Significantly, although his new position was established shortly before this meeting, the decision to set his salary two grades higher was not made until afterwards. Such action would not be compatible with a management which was displeased with the Complainant's conduct at the January 2 meeting.

The problems, which the Complainant was experiencing regarding obtaining cooperation from SONOPCO and adding Mr. Barker to his staff, commenced prior to his issuing his April 27, 1989 memo. Therefore, assuming arguendo, that these involved any retaliatory action, they would have to relate to the only incident of protected activity he has alleged to have occurred prior to that time, i.e., his participation in the January 2 meeting. For reasons already stated, nothing that the Complainant did or said at that meeting led to any retaliatory action. Any interference which Mr. McDonald may have caused in the Complainant's obtaining cooperation from SONOPCO and in Mr. Barker's transfer was not an outgrowth of that meeting. Rather, it was in keeping with his management philosophy of no need for nuclear expertise at Georgia Power's Atlanta headquarters. This is clearly borne out by the testimony adduced by the Complainant

relating to the corporate concern that others had raised over their inability also to transfer SONOPCO employees to Georgia Power headquarters. Furthermore, the ultimate decision not to permit Mr. Barker's transfer to the Complainant's staff was based on management's uncertainty as to the future need for NOCA and its hesitation to overstaff this department.

I turn now to the April 27, 1989, memorandum. If this document stood alone, I would have no hesitation in finding that it expressed no regulatory complaint by the Complainant. Rather, he merely relayed therein a concern that had been expressed to him by Mr. Smith. The Complainant expresses no opinion in the memo as to whether the concern is justified or indicates otherwise that he had adopted Oglethorpe's concern as his own.

I have quoted the April 27 memo in toto because I believe that it amply demonstrates why Mr. Williams was unhappy with the document. His objection to having the memorandum go forward, or even being preserved, was based on its obvious complaining style. Significantly, the memorandum which the Complainant wrote to Mr. Williams the previous day, which raised essentially the same reporting question, was retained in the Respondent's files. It appears to me that if Mr. Williams did not want any record of the reporting question in the company's files, he would have destroyed this memo. I believe Mr. Williams when he says that he was just trying to help the Complainant to be a better manager.

I recognize that in addition to the memorandum, the Complainant did mention a concern, as to Mr. McDonald's receiving his management direction from Mr. Farley instead of Mr. McDonald, to Mr. Evans and perhaps others. Mr. Evans did acknowledge the Complainant's having mentioned such concern "in passing." Depending on the tone of such conversation, Mr. Evans could have taken the concern as the Complainant's personal one. Nevertheless, the time frame for the oral complaints is not established in the record. Mr. Smith laid the matter to rest in May 1989 upon receipt of the organizational chart and Mr. Williams' memo. Although the Complainant continued to be concerned about the reporting relationship in June 1989, when he corresponded with Admiral Wilkinson, there is no evidence of record to establish that he continued to raise the subject with anyone beyond that time. Perhaps he had become as convinced as I am that Mr. McDonald did, in fact, take his management direction from Mr. Dahlberg in regard to the two nuclear plants owned, in part, by Georgia Power. Certainly, any doubts in his mind concerning the same should have been dispelled by the August 1989 meeting in reference to the Public Service Commission case. The evidence referable to what transpired at this meeting clearly established that Mr. Dahlberg exercised control over Mr. McDonald regarding Georgia Power's nuclear operations.

It was not until some six months after the April 27 memo that the Management Council determined that the Complainant had no potential with the Respondent. The witnesses who participated at this meeting have denied knowing of the memo at that time and have denied that anything stated therein influenced their evaluation. I have no reason to doubt their testimony in this regard. That their evaluation of the Complainant's abilities may have differed from earlier performance evaluations comes as no great surprise. Mr. Miller and Mr. Head, for, whom he had earlier worked, had retired from the company. The Complainant did not hold Mr. Miller's successor, Mr. Dahlberg, in high regard and the feeling may well have been mutual. Furthermore, the evaluation was based on his performance in a different position. Mr. Baker was concerned that the Complainant had not fulfilled his responsibility in this job of gaining cooperation from SONOPCO. Neither Mr. McDonald, who is the only company executive to have been identified as having attended the January 2, 1989 meeting, nor Mr. Williams, who is the only executive to have acknowledged seeing the April 27, 1989 memo, participated in this management council meeting.

The decision to terminate the position of manager of NOCA, which Messrs. Evans and Williams had considered for some time, was finalized in the November/December 1989 time frame. The exact date is unimportant. The Complainant knew that the decision had been made or was in the making when he met with Mr. Williams in late November. This should not have come to any "great surprise" to him in light of the predictions he had made to Admiral Wilkinson in his June letter. Considering (1) that Mr. Head, who had sponsored the formation of NOCA, had retired; (2) that Mr. Baker, was not totally convinced as to the necessity for NOCA from its origination but went along with it in order to give the Complainant something to do; (3) Mr. Farley expressed an opinion to Mr. Dahlberg in May 1989 that NOCA was a needless expense and at odds with the purpose for which SONOPCO was formed (4) that the following month, Mr. Dahlberg expressed doubts to Mr. Barker as to the continued need for NOCA; (5) that Dwight Evans, who had not been involved in the decision to form the NOCA group, felt that they did not need a high-level position to interface with SONOPCO but should interface with them at multiple points in a manner similar to what is done in other areas; (6) that after several months of considering the matter, Mr. Williams, who also had no input into NOCA's formation, decided that there was no need for a high level manager or separate organization to administer a contract if it ever came to fruition; (7) that the incorporation of SONOPCO had been delayed beyond expectations; and (8) that there was a general reorganization of the company at the time with other executive

and/or managerial positions being eliminated as cost-saving measures, I find that the decision to eliminate the position of manager of NOCA was in no way related to the Complainant's participation in the January 2, 1989 meeting or the concern raised in his April 27, 1989 memorandum as to from whom Mr. McDonald receives his management direction for operation of the Georgia Power nuclear plants. I find that, instead, the decision to eliminate the position was fully justified as a measure to operate the Respondent's nuclear program more economically and efficiently.

I find further that the change of the Complainant's office, the revocation of his executive parking privileges and badge and his restriction to certain floors of the headquarters building was not in retaliation for his having filed the instant complaint but was a justified security measure. As his position had been officially terminated and as he had rejected the possibility of a transfer to another position at SONOPCO or Georgia Power's headquarters, his ultimate departure from the company was a forgone conclusion at the time. He had been notified by Mr. Williams on February 2, 1989, four days before his complaint was filed, that his office would be moved. He had been transferred to Mr. Williams' supervision and his new office was on the same floor as his new supervisor. He had been observed with unidentified and apparently unauthorized persons in the executive parking area. That Mr. Williams' concern over the Complainant's shredding of documents may have later been proven to him to be unjustified does not mean that it was not a genuine concern when he first learned of the same. The February 6, 1989 initial complaint indicated that the Complainant had a copy of the April 27 "confidential" memo in his possession which demonstrates to me that concern over his possibly compromising other confidential company documents was well founded.

Conclusions of Law

As a preliminary matter, I note that the Respondent raised an issue as to the timeliness of the filing of the complaint in this case for the first time in its post-hearing brief. Pursuant to 29 C.F.R. §18.1, in the absence of any contrary provisions in the ERA, its implementing regulations and the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, the Federal Rules of Civil Procedure are applicable to the instant proceedings. Cf. Cooper v. Bechtel Power Corporation, 88-ERA-2, (Decision and Order of the Secretary, October 3, 1989). Rule 8(c) provides that statutes of limitations are affirmative defenses. Failure to assert such a defense in a Respondent's pleadings is considered a waiver of the

same. Paety v. U.S., 795 F.2d, 1533, 1536 (11th Cir., 1986). The defense must be asserted at the earliest possible moment. Davis v. Bregan, 810 F.2d 42 (2nd Cir., 1987). Consequently, irrespective of whether the Respondent's contentions regarding timeliness of the claim have merit, I conclude that they are too late in raising the issue.

I note also that Respondents, citing Brown & Root, Inc. v. Donovan, 747 F.2d 1029 (5th Cir. 1984), contend that as this matter involves strictly an internal complaint, it does not come within the purview of the ERA. While Respondent acknowledges that there have been holdings contrary to Brown & Root, in other circuits, i.e., the Tenth Circuit in Wells v. Kansas, Gas & Electric Co., 780 F.2d 1505 (1985) cert. denied 106 S. Ct. 3311 (1986) and the Ninth Circuit in Mackowiak v. University Nuclear Systems, 735 F.2d 1159 (1984), it argues that the facts in these two cases are distinguishable as the facts in the instant case do not involve quality or safety problems. However, as noted by the Complainant, in Willy v. The Coastal Corporation and Coastal States Management Corporation, 85-CAA-1 (Decision and Order of the Secretary of Labor, June 4, 1987), a case arising in the Fifth Circuit, the Secretary stated:

> I continue to be persuaded that reporting violations of the environmental statutes enumerated in 29 C.F.R. §24.1 internally to one's employer is a protected activity and tat Mackowiak and Kansas Gas & Electric rather than Brown & Root, set forth the appropriate resolution of this issue. For the reasons set forth below, I respectfully decline to follow the Fifth Circuit's decision in Brown & Root. Should it become necessary to do so on remand, the ALJ is instructed to follow Mackowiak and Kansas Gas & Electric on the internal complaint issue.

The Secretary went on to respectfully note that as the Supreme Court had denied a writ of certiorai in Kansas Gas & Electric the Fifth Circuit should be given the opportunity to consider the issue in light of the Tenth Circuits more recent decision. I interpret the Secretary's holding as being broad enough to encompass internal reporting of any violation of the ERA and consider myself to be bound by the same.

In any event, I consider the two foregoing issues to be mooted by the findings I have made and the conclusions I am prepared to reach on other issues.

Section 210(a) of the ERA provides:

> No employer, including a Commission licensee, an applicant for a Commission license, or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)-
>
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. §2011 et seq.], Or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
>
> (2) testified or is about to testify in any such proceeding or;
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. §2011 et seq.].

The applicable burdens and order of presentation of proof in cases arising under Section 210(a) of the ERA were set forth by the Secretary in Darfey v. Zack Company, 80-ERA-2 (April 25, 1983) as follows:

> [T]he employee must initially present a prima facie case consisting of a showing that he engaged in protected conduct, that the employer was aware of that conduct and that the employer took some adverse action against him. In addition, as part of his prima facie case, "the plaintiff must present evidence sufficient to raise the inference that . . . Protected activity was the likely reason for the adverse action." [Citation omitted]. If the employee establishes a prima facie case, the employer has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate,

> nondiscriminatory reasons. Significantly, the employer bears only a burden of producing evidence at this point; the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. [Citation omitted]. If the employer successfully rebuts the employee prima facie case, the employee still has "the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision . . . [The employee] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." [Citation omitted]. The trier of fact may then conclude that the employer's proffered reason for its conduct is a pretext and rule that the employee has proved actionable retaliation for protected activity. Conversely, the trier of fact may conclude that the employer was not motivated, in whole or in part, by the employee's protected conduct and rule that the employee has failed to establish his case by a preponderance of the evidence." [Citation omitted]. Finally, the trier of fact may decide that the employer was motivated by both prohibited and legitimate reason, i.e., that the employer had "dual motives."
>
> . . .[I]f the trier of fact reaches that latter conclusion, that the employee has proven by a preponderance of the evidence that the protected conduct was a motivating factor in the employer's action, the employer, in order to avoid liability, has the burden of proof or persuasion to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. [Citations omitted].

Slip op at 7-9

Citing Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989) Complainant contends that "'as a matter of law' 'temporal proximity' between an employee's engaging in protected activity and a change in management attitude toward the employee is alone sufficient to establish a discriminatory motive." (Emphasis the Complainant's). However, I find nothing in the Court's opinion in Couty which stands for the proposition that a "change in management attitude" sufficient to establish discriminatory

motive either standing alone or otherwise. I am aware, however, that in Shaw v. Mast Advertising and Pub. Inc., 715 F.Supp. 1503 (D. Kan 1989) the Court held that evidence of the employee's having been treated differently subsequent to filing a discrimination complaint was one factor to be considered with other evidence in determining whether her discharge was in retaliation.

What the Court did say in Couty was that:

> "A prima facie case of retaliatory discharge is established when the plaintiff shows: (1) engagement in protected activity; (2) defendant's awareness of plaintiff's engagement in protected activity (3) plaintiff's subsequent discharge and (4) that the discharge followed the protected activity so closely in time as to justify an inference of retaliatory motive. [Citations omitted] (Emphasis added)

The Court in Couty went on to hold:

> "In our opinion, [the ALJ's conclusion that the evidence did not support an inference of retaliatory motivation] was error since petitioner was discharged roughly thirty days after he engaged in protected activity. Our cases hold that this temporal proximity is sufficient as a matter of law to establish the final required element in a prima facie case of retaliatory discharge. See Keys [v. Lutheran Family and Children's Service of Missouri] 668 F.2d at 358 (less than two months); Womack [v. Munson] 619 F.2d at 1296 (twenty-three days)." (Emphasis added).

Thus, what the Court held to be a "temporal proximity" as a "matter of law" was a period of "roughly thirty days." Other cases cited by the Claimant as showing that "[a]dverse action closely following protected activity is itself evidence of an illicit motive" likewise rely on a relatively short interim between the protected activity and adverse action. In Newkirk v. Cypress Trucking Lines, Inc., 88-STA-17, Decision and Order of the Secretary (February 13, 1989) the interval was only six days and in Priest v. Baldwin Assoc., 84-ERA-30, Decision and Order of the Secretary (June 11, 1986) the interval was approximately one month. Further, in the cases relied on by the Secretary in Newkirk, the time elements ranged from 2 days to six

weeks. See: Jim Ca sley Pontiac v. NLRB, 620 F.2d 122, 126 (6th Cir. 1980) (6 weeks); NLRB v. Advanced Business Forms Corp., 474 F.2d 457, 465 (2d Cir. 1973) (17 days); Donovan v. Stafford Const. Co., 732 F.2d 954, 960 (D.C. Cir. 1984) (2 weeks); NLRB v. American Geri-Care, Inc., 697 F.2d 56, 60 (2d Cir. 1982) cert. denied, 461 U.S. 906 (1983) (5 days); NLRB v. Rain-Wall, Inc., 732 F.2d 1349, 1354 (7th Cir., 1984) (2 days). In other cases where the temporal relationship between protected activity and retaliation has been considered significant, the time spreads have been similarly brief. See e.g.: Donnellon v. Fruehauf Corp. 794 F.2d 598, 601 (11th Cir. 1986) (one month) Devlin v. Federal Reserve Bank of St. Louis 634 F.Supp. 389 (E.D.Mo., 1986) (2 weeks); Eirvins v. Adventist Hea!th System/Eastern & Middle America, Inc., 660 F.Supp. 1255 (D. Kan. 1987) (7 days); Saks v. Amarilla Equity Investors, Inc., 702 F.Supp. 256 (D. Col. 1988) (16 days). On the other hand, as Respondent has noted, the inference of causal link weakens as the length of time between the protected activity and the alleged adverse action increase. 1/ I agree. See, Booth v. Birmingham News Co., 704 F.Supp. 213, (N.D. Ala. 1988) aff'd mem., 864 F.2d 793 (adverse action taken some six or seven months after discrimination claim settled was insufficient standing alone to demonstrate requisite causal connection between protected activity and alleged retaliatory discharge); Fitch v. R.J. Reynolds Tobacco Co., 675 F.Supp. 133 (requisite causal link not established between filing complaint and ter.ination 10 months later); Cooper v. City of North Olmstead, 795 F.2d 1265 (6th Cir. 1986) (mere fact that plaintiff was discharged four months after filing a discrimination claim is insufficient to support an inference of retaliation); Hollis v. Fleetguard, Inc., 668 F.Supp. 631 (M.D. Tenn. 1987) aff'd sub nom, 848 F.2d 191 (discharge 3 months after harassment complaint and 4 months after being warned to improve performance does not establish a causal connection). In Brown v. ASD Computing Center, 519 F.Supp 1096, 1116, 1117 (S.D. Ohio 1981) aff'd sub nom Brown v. Mark, 709 F.2d 1499 (6th Cir. 1983) the Court stated:

> In the present case, Plaintiff's discharge occurred on December 13, 1978, approximately three months after her announcement (on September 19 or 22, 1978) of an intention to consult with the E.E.O., and four months after

1/ Respondent relies, in part on Jennings v. Tinley Park Community Consol. Sch. Dist 146, 796 F.2d 962 (7th Cir. 1986) as supporting this proposition by holding that a four month lapse is too long to show causal connection. I find no such holding from my reading of the case.

> she was advised by Pitts to contact the E.E.O Office. While this Court makes no determination of the precise time span beyond which an inference of retaliation may not be created, the period involved herein does not provide the inference necessary to establish a prima facie case of retaliation. In this regard, the Court notes that the inference of retaliation which arises through timing is not provided for in Title VII, but is merely an attempt used by Courts, most notably Hochstadt v. Worchester Foundation for Experimental Biology, Inc., 425 F.Supp. 318 (D. Mass. 1976), aff'd. 545 F.2d 222 (1st Cir. 1976) (Hochstadt) to adapt the order and allocation of proof outlined in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1917, 36 L.Ed.2d 668 (1973) to cases involving retaliation. Hochstadt, 425 F.Supp. at 324. This Court agrees with the utility of such an inference but would hesitate to expand its scope, particularly in a case such as the present, where there are no other indicia of retaliation. Thus, as the undisputed facts pertaining to Plaintiff's protected activity and her subsequent discharge neither establish a retaliaTory motive, nor are so connected in time as to create an inference of retaliation, the evidence fails to establish a prima facie case of retaliation.

Complainant contends further that "[i]t is well settled that a lowering of an employee performance rating after he or she engaged in protected activity constitutes sufficient evidence of discriminatory motive. 2/ I agree that a causal connection element may be established by proof that the employee received favorable performance evaluation before engaging in protected activity and negative evaluations after engaging in such activity. See Sawers v. Kemina, Inc., 701 F.Supp. 809 (S.D. GA. 1988). However, this is no hard and fast rule. For example, in Mitchell v. Baldridge, 759 F.2d 80, 88 (D.C. Cir. 1985) the Court found that a shift to lower performance rating did not constitute evidence of discriminatory motive when it coincided with a change in job responsibilities. The temporal relationship between the protected activity and lower performance rating is also a factor. In Fitch v. R.J. Reynolds the Court held:

2/ Complainant again cites Couty v. Dole (supra) as supporting this proposition. However again my reading of the case fails to reveal any mention of a performance evaluation.

> The fact that seven months after he filed and then withdrew the EEOC charge, Fitch received the lowest performance evaluation to date is insufficient to make out a prima facie case of retaliatory action."

675 F.Supp. at 138

The same may be said regarding the Complainant's contention, citing Murphy v. Consolidated Coal Co., 83-ERA-4 Slip op. ALJ at 18 (August 2, 1983) (Emphasized to show correct citations), that receipt of pay increases before being terminated establishes discriminatory motive. I recognize that it has been held that the manner in which an employee learns of termination can evidence a discriminatory motive. See e.g. Deford v. T.V.A., 81-ERA-1, slip op. of ALJ at 6 (January 7, 1981). However, it is only one factor to be considered and is not sufficient standing alone to establish a prima facie case of retaliatory action.

In Nesmith v. Martin Marietta Aerospace, 833 F.2d 1489 (11th Cir. 1987) it was held that evidence showing that the employee's career thrived during the presidency of his mentor and faltered when the president left the company supported the district court's conclusion that his discharge was not in retaliation for his having engaged in protected activity.

In regard to the element of scienter, Respondent, quotes Delchamps, Inc. v. NLRB, 585 F.2d 91, 94 (5th Cir. 1978) to the effect that the Complainant "must show that the particular supervisor responsible for the firing knew about the discharged employee's [protected] activities." However, the Court in Delchamps recognized its Circuits earlier holding in N.L.R.B. v. Neuhaf Bros. Packers, Inc., 375 F.2d 372 (5th Cir. 1967) which was to the effect that scienter can also be established by showing that a supervisor with knowledge of the protected activity "significantly contributed to the accomplishment of the discharge" while not actually affecting the same.

On the basis of my factual findings and the aforementioned legal principles, I reach the following ultimate findings and conclusions:

I. Prima Facie Case

(a) The January 2, 1989 Meeting

1. Protected Activity - The Complaint's mere attendance at the pre-trial meeting does not constitute protected activity. Nothing said at the meeting either by or to the Complainant constituted protected activity.

2. Scienter - No one who attended the January 2 meeting is shown to have any input in the decision to eliminate the position of Manager of NOCA. The two executives primarily responsible for such decision, Mr. Williams and Mr. Evans, had no knowledge of the Complainant's participation at the meeting. Accordingly, even if the Complainant engaged in protected activity at the meeting the Respondent was without knowledge of the same. As the Complainant has failed to establish this essential element, he has not presented a prima facie case relating to the January 2, 1989 meeting.

(B) The April 27, 1989 Memorandum

1. Protected Activity - For reasons already assigned, I will conclude that the Complainant had adopted Mr. Smith's concern about the reporting structure as his own and that his expression of the same constituted protected activity.

2. Scienter - As Mr. Williams actually saw the memo and as Mr. Evans was aware of the Complainant's concern over the reporting structure and as both had at least significant input into the decision to eliminate the Complainant's position, I conclude that the Respondent had knowledge of the protected activity.

3. Adverse Action - The elimination of the Complainant's position which necessitated his transferring to Birmingham and/or accepting a lower salary if he desired to remain employed by the Respondent, constituted adverse action.

4. Likely Reason for Adverse Action - The decision to eliminate the Complainant's managerial position came over six months after he wrote the memo. He had not otherwise raised the reporting concern for several months prior to the decision. Mr. Williams had "forgotten about" the memo in the interim. The Complainant's concern was of no consequence to Messrs. Williams and Evans as they knew that Mr. McDonald in fact reported to Mr. Dahlberg. The Complainant's having voiced the concern did not enter into their decision

that the position was not needed and should be eliminated. Accordingly, I conclude that the Complainant's having expressed a concern about the reporting structure was not the likely reason for eliminating the position of manager of NOCA and that the Complainant has not made out of prima facie case relative to the expression of this concern.

(C) Change of Office and Revocation of Executive Parking Privileges

1. Protected Activity - The Complainant engaged in protected activity by filing the instant complaint.

2. Scienter - Mr. Williams could not have known of the filing of this complaint at the time he informed the Complainant that his office would be changed. Consequently, the Respondent did not have knowledge of the protected activity at the time the decision was made to change the Respondent's Office. However, they may have had such knowledge at the time the executive parking privileges were changed and the Complainant's access was limited.

3. Adverse Action - Although I have some doubts, I will assume that the parking and access changes were adverse actions.

4. Likely Reason for Access Action - The Complainant's position had been eliminated effective February 1, 1990 and it may be reasonably assumed that he was no longer entitled by position to park in the executive lot. In any event, reasonable security concerns were the likely reason for this adverse action rather than the filing of this Complaint. It follows that a prima facie case relating to parking and access has not been established.

II. Legitimate, Nondiscriminatory Reason for Eliminating Complainant's Position

I conclude that even if the Complainant had raised the presumption of disparate treatment, the Respondent has rebutted the same by presenting evidence that the alleged disparate treatment was motivated

by legitimate, nondiscriminatory reasons, i.e., that the elimination of the position was based on a business decision that it was not needed. The subsequent change of office assignment was based on the desire to have him located in close proximity to his new supervisor and the change in parking assignment and building access was based on security concerns.

III. True Reason for Employment Decision

I conclude that the [illegible] was not motivated to eliminate the Complainant's position, change his office, revoke his [illegible] parking privileges and limit his access within the headquarters building either in whole or in part by any protected conduct. The Employer has established to my satisfaction that the sole reason for eliminating the position, which on the Complainant's own volition triggered his departure from the company, was because it was an expensive, unnecessary position and that actions taken subsequent to the filing of this complaint were justified for security reasons.

RECOMMENDED ORDER

It is recommended to the Secretary of Labor that the Complaint of Marvin Hobby be dismissed with prejudice.

JOEL R. WILLIAMS
Administrative Law Judge

Washington, D.C.
JRW/yw