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

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Docket Nos. 50-528, 50-529, (2,206)
and 50-530

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

David K. Colapinto
National Whistleblower Center
517 Florida Avenue, N.W.
Washington, D.C. 20001-1850

Dear Mr. Colapinto:

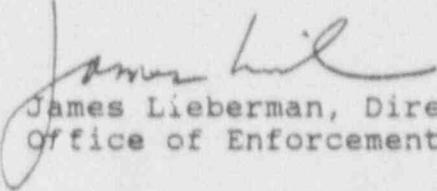
I am responding to your Petition of July 20, 1992. Your request was referred to the Staff under Section 2.206 of Title 10 of the Code of Federal Regulations (10 CFR §2.206).

Enclosure 1 contains the Director's Decision (DD-92-07) in regard to your Petition. For the reasons stated in the Director's Decision, I have granted your Petition in part and denied your Petition in part.

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

Enclosure 2 is a copy of the Notice of this Decision, which is being filed with the Office of the Federal Register.

Sincerely,


James Lieberman, Director
Office of Enforcement

Enclosures:

- 1. Director's Decision
- 2. Federal Register Notice

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF ENFORCEMENT

James Lieberman, Director

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'92 NOV 24 AB:55

OFFICE OF SECRETARY
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In the Matter of

Docket Nos. 50-528
50-529
50-530

ARIZONA PUBLIC SERVICE
COMPANY, et al.
(Palo Verde Nuclear Generating
Station, Units 1, 2, and 3)

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

DD-92-07

I. INTRODUCTION

On July 20, 1992, David K. Colapinto, an attorney with the National Whistleblower Center, filed a letter with the Chairman of the U.S. Nuclear Regulatory Commission ("NRC"), on behalf of two of his clients, Sarah C. Thomas and Linda E. Mitchell ("petitioners"). The letter requests the NRC to take enforcement action against the Arizona Public Service Company ("APS"), licensee for the Palo Verde facility, where petitioners are employed, alleging violations of Commission's Employee Protection provisions. See 10 C.F.R. §50.7. Specifically, petitioners allege that they have been subjected to harassment, intimidation, discrimination, and a "hostile work environment" by Palo Verde management. Petitioners request that the NRC initiate a proceeding directing APS to show cause why the Palo Verde licenses should not be revoked, modified, or suspended. In addition, petitioners request the NRC to assess a civil penalty

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against APS in the amount of at least \$1.2 million. The letter is being treated as a petition under the NRC's regulations contained in 10 C.F.R. §2.206, and has been referred to me for a response. By letter dated August 11, 1992, this Office acknowledged receipt of petitioners' request for enforcement action and promised a response within a reasonable time.¹ After further review, the petitioners' request has been granted in part and denied in part, as described below.

II. BACKGROUND

Petitioners' request is based upon two Recommended Decisions and Orders ("Recommended Decisions") issued by two Administrative Law Judges ("ALJs") in proceedings before the U.S. Department of Labor ("DOL"), pursuant to section 210 of the Energy Reorganization Act ("ERA"), 42 U.S.C. §5851.² In each case, the DOL ALJs found that APS had discriminated against one of its employees for engaging in protected activity in violation of Section 210 of the Energy Reorganization Act ("ERA"). See Sarah Thomas v. Arizona Public Service Co., 89-ERA-19 (April 13, 1989); Linda Mitchell v. Arizona Public Service Co., 91-ERA-9 (July 2, 1992). Both cases are now under review by the Secretary of Labor ("Secretary").

¹The letter also denied petitioners' request that the NRC take enforcement action "within 30 days."

²Section 210 has recently been renumbered section 211 in amendments contained in section 2902 of The Energy Policy Act of 1992, H.R. 776, signed into law on October 24, 1992.

Briefly, the ALJ in the Thomas case found that Ms. Thomas' first-line supervisor reassigned her to a more demanding and less desirable job because she raised safety concerns to higher APS management. The ALJ also found that subsequent discriminatory actions by APS included denying Ms. Thomas a promotion, treating Ms. Thomas differently from another employee when they were both being considered for another promotion, requiring Ms. Thomas to complete unnecessary training, and suspending Ms. Thomas' certifications to conduct various tests.

In the Mitchell case, another ALJ found that Ms. Mitchell was discriminated against as a result of the presence of a "hostile work environment." Specifically, the ALJ found that Ms. Mitchell was subjected to a series of actions which comprised a hostile work environment in retaliation for engaging in certain protected activities. The protected activities included raising safety concerns to APS management and to the NRC, including concerns regarding problems with emergency lighting at Palo Verde. The ALJ found that APS management failed to take prompt, effective remedial action to halt this harassment. The petition asks the NRC to take enforcement action against APS, notwithstanding the pendency of the Secretary's review of both cases.

III. DISCUSSION

A. Enforcement Action On The Mitchell and Thomas Cases.

Upon receipt of the Mitchell decision, the NRC Staff began reviewing that action, as well as the Thomas case. The NRC had not taken enforcement action on the Thomas case because at the time that decision was issued, the NRC normally deferred action on section 210 cases until after a final decision by the Secretary of Labor on the allegations of discrimination.³ Recently, however, the NRC Staff completed an enforcement action involving the Byron facility based upon a decision by the Secretary of Labor issued more than five years after the discrimination occurred. See Commonwealth Edison Co., EA 92-019 (April 22, 1992) NUREG-0940, Vol. 11, No. 2, I.B-1; see also DOL Case No. 87-ERA-4 (Jan. 22, 1992). As a result of that action, the NRC Staff, after consultation with the Commission, concluded that more timely action was appropriate. Therefore, in the future, the NRC Staff will normally take enforcement action in significant cases of discrimination after an initial finding of discrimination against an NRC licensee by a DOL ALJ. However, in light of the fact that all ALJ Recommended Decisions are automatically reviewed by the Secretary of Labor, the NRC will

³See, e.g., General Electric Co. (Wilmington, North Carolina Facility), DD-86-11, 24 NRC 325, 331-32 (1986); General Electric Co. (Wilmington, North Carolina Facility), DD-89-1, 29 NRC 325, 330 (1989).

allow a licensee to defer a response to a Notice of Violation until after the final ruling by the Secretary.

In accordance with this new policy, the NRC has now taken enforcement action against APS based upon the ALJ decisions in Mitchell and Thomas. On September 30, 1992, Mr. John B. Martin, Regional Administrator of NRC Region V, issued a Notice of Violation and Proposed Imposition of Civil Penalty to APS for the two violations in the combined amount of \$130,000. See Enforcement Action 92-139 (Sept. 30, 1992) ("EA 92-139"). This action was taken in accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions" (Enforcement Policy), 10 C.F.R. Part 2, Appendix C. In addition, the NRC asked APS to address (1) the actions taken to minimize any possible chilling effect resulting from the circumstances surrounding the Thomas and Mitchell cases; and (2) any actions taken to assess employee concerns related to reservations related to raising safety issues and actions taken to eliminate or minimize those reservations.

The NRC considered the violation in the Thomas case to be a Severity Level III violation because the discrimination involved principally Ms. Thomas' first-line supervisor. See Enforcement Policy, Supplement VII. The NRC considered the violation concerning Ms. Mitchell to be a Severity Level II violation based primarily upon the actions of the individual who was employed by APS at that time as the Director of Quality Assurance (QA). Those actions are of particular concern to the NRC because, as

the Director of QA, this person was responsible for the Employee Concerns Program and for protecting those persons who raised safety concerns from harassment and discrimination and whose position was above first-line supervisor. The issuance of EA 92-139 sends a strong message to the licensee that discrimination by APS management -- at any level -- will not be tolerated.

Petitioners suggest that the NRC assess a civil penalty of \$1,200,000 on APS. I have found that a civil penalty in that amount is not warranted. The appropriate guidance for assessing a civil penalty is found in the Commission's Enforcement Policy. The Enforcement Policy classifies different types of violations by their relative severity, provides examples of the types of violations and the recommended severity levels for these violations, describes the circumstances in which formal sanctions, including orders, civil penalties, and notices of violation are appropriate, and provides factors that should be considered in determining whether the proposed civil penalty should be mitigated or escalated. Petitioners did not address either the examples and severity levels or the escalation and mitigation factors in recommending a proposed civil penalty.⁴

In arguing that the NRC should assess a civil penalty of \$100,000 for each individual action that is alleged to be discrimination, Petitioners, in effect, are asking the NRC to

⁴In assessing the proposed civil penalty, the NRC reviewed the escalation and mitigation factors in the Enforcement Policy and concluded that no adjustment in the base civil penalty was appropriate.

treat each alleged APS act of harassment in both the Thomas and Mitchell cases as an individual Severity Level I violation. That treatment is not warranted for two reasons. First, under the Enforcement Policy, Supplement VII, the example provided of a Severity Level I violation is employment discrimination by senior corporate management. The only involvement by APS corporate management above the plant level in either case before me now is the tangential involvement of Mr. William Conway, at the time in question the incoming APS vice-president, in the Mitchell case. However, the ALJ generally complimented Mr. Conway's actions, see Mitchell, Slip Op. at 38-39 and 43, and I have no reason to disagree with the ALJ's analysis at this time. Thus, there is no reason to treat the "hostile work environment" in this case as a Severity Level I violation.

Second, in the NRC's judgment, the individual actions in the Thomas and Mitchell cases, while serious, do not rise to the level of severity necessary to constitute separate violations of 10 C.F.R. §50.7. In fact, the ALJ in the Thomas case specifically found that the individual "items" in that case would not constitute employment discrimination in and of themselves; instead, it was only when those "items" were viewed in the context of the entire picture that they constituted discrimination. See Thomas, Slip Op. at 8. Accordingly, it was appropriate to treat the actions in the Thomas case in the aggregate. Likewise, the discrimination in the Mitchell case did not consist of separate individual violations; instead, the

discrimination consisted of a hostile work environment which was a single aggregate action. Thus, it was not appropriate to treat each individual action in these two cases as a separate violation of section 50.7.⁵

Petitioners also justify the proposed \$1,200,000 civil penalty by reliance upon the NRC's actions in Tennessee Valley Authority, EA 89-201 (April 12, 1990) NUREG-0940 Vol 9, No. 4, I.A-66 ("EA 89-201"), in which the NRC issued a civil penalty of \$240,000. However, as that case clearly demonstrates, the NRC followed the Enforcement Policy described above. In EA 89-201, the NRC found that three employees of the Tennessee Valley Authority ("TVA") were reassigned to new positions in retaliation for raising safety concerns to an NRC Commissioner. The TVA official who was principally involved was a member of plant management above first-level supervisor. Therefore, each violation was classified as a Severity Level II violation for which the civil penalty under the Enforcement Policy was \$80,000. Thus, the aggregate civil penalty was \$240,000. Likewise, in this case, the NRC has based the proposed civil penalty upon the level of the individuals who were primarily or most effectively

⁵While the NRC concludes that treatment of each action as a violation is not appropriate in this enforcement action, the NRC reserves the right to treat individual actions as separate violations in an appropriate case.

involved in the discrimination in the two actions involved in this petition. *

B. Additional Allegations of Employment Discrimination at APS.

The petition alleges that Ms. Mitchell has suffered additional acts of employee discrimination at Palo Verde after the events that are the subject of the DOL Recommended Decision. Specifically, petitioners assert that a recent finding by the DOL Wage and Hour Division requires an escalation of any civil penalty. On May 8, 1992, the Assistant District Director, Employment Standards Administration, Wage and Hour Division, DOL, issued a preliminary finding that Ms. Mitchell's April 1992 Performance Appraisal had been lowered because she engaged in protected activity. APS has filed an appeal from that finding, initiating the DOL hearing process. That appeal has been consolidated with other pending matters for hearing before a DOL ALJ.

The NRC has already taken prompt action in response to the DOL's finding. Initially, the NRC secured the DOL investigation file and reviewed it. Subsequently, on May 22, 1992, Mr. John

*Petitioners also ask that the NRC take action against the former APS QA Director individually. At this time, however, there is not sufficient information to warrant enforcement action directly against that individual. See 10 C.F.R. Part 2, Appendix C, Section V. E. While that individual's actions were a significant contribution to the hostile work environment, they may not have constituted a violation of 10 C.F.R. §50.7, in and of themselves. Therefore, the NRC will not take enforcement action against this individual at this time. The NRC will review the Secretary's final decision in the Mitchell proceeding and determine at that time if additional action is warranted.

Martin, Administrator, NRC Region V, issued a letter to APS, informing APS management that the NRC was concerned that this action might constitute a violation of 10 C.F.R. §50.7 and that it might have a "chilling effect" on the willingness of employees or contractor personnel to raise safety concerns. Specifically, the letter asked APS to provide the NRC with the basis for the action taken against Ms. Mitchell and to explain what steps APS was taking to ensure that employees were fully informed of their rights to address safety concerns to the NRC or any other regulatory agency without fear of retaliation.

On June 23, 1992, APS responded to the NRC's May 22 letter. In its response, APS provided its version of the events in question and described the steps it was taking to ensure that all APS employees were aware of their rights under the ERA and the Atomic Energy Act ("AEA"). As I noted above, the NRC normally will await a decision by a DOL ALJ before taking enforcement action. After reviewing APS' response of June 23, the NRC Staff saw no need to deviate from the NRC's normal policy in this case at this time. The NRC will continue to monitor this case. Once the DOL ALJ issues a Recommended Decision, the NRC will consider whether enforcement action is warranted.

C. Allegations of A "Hostile Work Environment" at Palo Verde.

The petition also alleges that APS has created a "hostile work environment" at Palo Verde which discourages Palo Verde employees from raising safety concerns. As a result of that

allegation and the decisions in the Thomas and Mitchell cases, the NRC Staff recently conducted an unannounced special inspection at Palo Verde to gain insight into the perceptions and attitudes of workers at the site with regard to their ability to raise significant safety issues. See NRC Inspection Report No. 50-528/529/530/92-33 (Oct. 8, 1992) ("Inspection Report 92-33"). During this inspection, NRC personnel interviewed 314 site employees who were either APS direct employees or APS contractors. Inspection Report 92-33 at 2-4. These employees comprised a sample of Palo Verde employees who performed safety-significant work.

Of those employees interviewed, approximately 92% stated that they felt free to raise significant safety issues to their immediate supervisor, to higher levels of APS management, to the Employee Concerns Program or "Hotline," or to the NRC. Inspection Report 92-33 at 4. Approximately 6% of those interviewed indicated that they felt free to raise significant safety issues to their immediate supervisor but felt some reluctance to raise the issues higher. Id. Approximately 2% of those interviewed felt some reluctance to raise significant safety issues to their immediate supervisors. Id. The survey did not determine the root cause for the reluctance that was expressed by 8% of those interviewed. Inspection Report 92-33 at 5.⁷

⁷Furthermore, five of those employees interviewed informed the NRC inspectors that they believed that they had suffered employment discrimination in retaliation for raising safety

In its letter transmitting Inspection Report 92-33 to APS, the NRC concluded that

[w]hile these results are not indicative of a widespread problem with reluctance of APS employees to raise significant safety issues to their immediate supervisors or above, they do indicate that the environment at Palo Verde for raising significant safety concerns can be improved. Please advise us of your plans in this regard.

The NRC was and is concerned over any perception that an employee might suffer discrimination because of raising safety concerns. Therefore, the NRC Staff requested APS to advise it of the steps being taken to resolve this perception problem, in addition to the response required in reply to EA 92-139, concerning plans to assess the extent employees have reservations for raising safety concerns. On October 30, 1992, APS filed a consolidated response to both Inspection Report 92-33 and EA 92-139, detailing the steps that it is in the process of taking to address this concern. In light of the findings of the NRC special inspection at Palo Verde as expressed in Inspection Report 92-33, APS' response to the NRC's May 22, 1992 letter, and APS' response to EA-92-139 and Inspection Report 92-33, I have concluded that no further action is necessary at this time regarding petitioners' allegation of a "hostile work environment" at Palo Verde.

concerns. The NRC will review these claims through the NRC allegation process. See Inspection Report 92-33 at 5.

D. Request For Institution of Proceedings Under Section 2.206.

Petitioners request that the NRC initiate show cause proceedings to revoke, modify and/or suspend Palo Verde's operating license. The institution of proceedings in response to a request for action under 10 C.F.R. §2.206 is appropriate only when substantial health and safety issues have been raised. See Consolidated Edison Co. of New York (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 176 (1975), and Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), DD-92-1, 35 NRC 133, 143-44 (1992). While the allegations contained in the instant petition are indeed serious, they do not raise substantial health and safety issues that would justify revocation, suspension, or modification of the Palo Verde licenses. Instead, I find that the NRC Staff's actions described above were the appropriate response to the DOL Recommended Decisions consistent with the Commission's Enforcement Policy. Accordingly, I have concluded that no basis exists for initiating a proceeding as requested by petitioners.

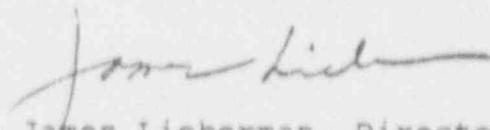
IV. CONCLUSION

In conclusion, I have granted the petition insofar as it requests that the NRC take enforcement action against APS for the discrimination demonstrated in the Thomas and Mitchell cases. I have denied the request to the extent that the petition seeks a civil penalty above \$130,000 and requests that proceedings be

initiated to show cause why the license should not be revoked, modified, and/or suspended.

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

FOR THE NUCLEAR REGULATORY COMMISSION



James Lieberman, Director
Office of Enforcement

Dated at Rockville, Maryland,
this 23rd day of November, 1992

UNITED STATES NUCLEAR REGULATORY COMMISSION

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ARIZONA PUBLIC SERVICE COMPANY

PALO VERDE NUCLEAR GENERATING STATION, UNITS 1, 2, AND 3

OF SECRETARY
NOV 24 1992
USNRC

ISSUANCE OF DIRECTOR'S DECISION UNDER 10 CFR §2.206

Notice is hereby given that the Director, Office of Enforcement, has taken action with regard to a Petition for action under 10 C.F.R. §2.206 received from David K. Colapinto, of the National Whistleblower Center, dated July 20, 1992, on behalf of Sarah C. Thomas and Linda E. Mitchell (petitioners), regarding the Palo Verde Nuclear Generating Station, Units 1, 2, and 3.

Petitioners alleged that Arizona Public Service Company (APS or the licensee) had violated NRC regulations prohibiting employment discrimination against employees who engage in protected activity. Petitioners requested that the Commission issue a civil penalty to APS in the amount of \$1.2 Million. Petitioners also requested that the NRC institute a proceeding to suspend, modify, or revoke the licenses held by APS to operate the three units at the Palo Verde facility.

As a basis for this allegation, petitioners submitted two Recommended Decisions by Administrative Law Judges (ALJs) of the Department of Labor (DOL) holding that APS had unlawfully discriminated against each petitioner because they raised safety concerns both to APS management and to the NRC. The first ALJ found that APS had reassigned Ms. Thomas to a more demanding and

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less desirable job because she raised safety concerns to higher APS management. The ALJ also found that APS subsequently denied Ms. Thomas a promotion, treated her differently from another employee when both were being considered for another promotion, required her to complete unnecessary training, and suspended her certifications to conduct various tests.

The second ALJ found that Ms. Mitchell was discriminated against as a result of the presence of a "hostile work environment." Specifically, the ALJ found that Ms. Mitchell was subjected to a series of actions which comprised a hostile work environment in retaliation for engaging in certain protected activities. The protected activities included raising safety concerns to APS management and to the NRC, including concerns regarding problems with the emergency lighting at Palo Verde. The ALJ found that APS management failed to take prompt effective action to halt this harassment.

The Director of the Office of Enforcement has decided to grant the Petition in part and deny the Petition in part. In accordance with NRC Enforcement Policy, the NRC has issued a civil penalty (EA 92-139) of \$130,000 to APS for the two violations as found in the Recommended Decisions. However, because all Recommended Decisions by DOL ALJs are automatically reviewed by the Secretary of Labor, the NRC has allowed APS to defer payment of the civil penalty until after the DOL completes its review.

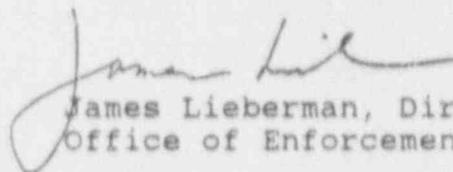
The Director denied petitioners' request for an additional civil penalty to be assessed against APS. The Director also

denied petitioners' request to institute a proceeding to revoke, suspend, or modify the Palo Verde licenses. The reasons for these denials are explained in the "Director's Decision Under 10 CFR 2.206," (DD-92-07) which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, N.W., Washington, D.C. 20555, and at the Local Public Document Room for the Palo Verde Nuclear Generating Station, the Phoenix Public Library, 12 East McDowell Road, Phoenix, Arizona 85004.

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

Dated at Rockville, Maryland, this ^{23rd} day of November, 1992.

FOR THE NUCLEAR REGULATORY COMMISSION


James Lieberman, Director
Office of Enforcement

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