

23
11-21-86

COALITION FOR RESPONSIBLE ENERGY EDUCATION
315 West Riviera Drive
Tempe, AZ 85282
July 16, 1986

1 Director, Office of Inspection and Enforcement
2 U.S. Nuclear Regulatory Commission
3 Washington, D.C. 20555

4 RE: Show Cause Petition Pursuant to 10 CFR 2.206(a) In the Matter
5 of Arizona Public Service, et al. (Arizona Nuclear Power Project
6 Palo Verde Nuclear Generating Station), Requesting Imposition of
7 Civil Penalty or Other Action Under 10 CFR 50.7(c)(2).

8 1. This petition is brought by the Coalition for Responsible
9 Energy Education (CREE) before the Director, Office of Inspection
10 and Enforcement, pursuant to 10 CFR 2.206(a). The petition
11 alleges that recent action by Arizona Nuclear Power Project (ANPP)
12 subjecting selected Palo Verde Nuclear Generating Station
13 workers to polygraph examinations expressly to identify the source
14 of information "leaked" to the local media violates 10 CFR 50.7.
15 Therefore, CREE requests that a civil penalty be imposed on
16 Arizona Public Service Company/Arizona Nuclear Power Project, as
17 provided under 10 CFR 50.7(c)(2), or other appropriate enforcement
18 action be taken.

19 DESCRIPTION OF PETITIONER

20 2. CREE is a non-profit volunteer organization based in
21 Arizona, principally Maricopa County. CREE's headquarters are
22 located at 315 West Riviera Drive, Tempe, AZ 85282. CREE was
23 founded in 1982 to address energy issues in Arizona, particularly
24 nuclear power, from an environmental and consumerist viewpoint,
25 through public education, research, litigation and advocacy.
26 CREE, through its attorneys and officers, has represented its
members in show cause petitions filed with the NRC and in rate
case proceedings before the Arizona Corporation Commission on

1 several occasions. CREE's membership consists of organizations
2 located in and individuals residing in Arizona.

3 AUTHORITY

4 3. Title 10 of the Code of Federal Regulations 2.206(a)
5 establishes the right of the public to petition the Commission,
6 Director of Office of Inspection and Enforcement, and other
7 specified directors to institute proceedings pursuant to 10 CFR
8 2.202 for such relief as may be proper. The Commission may,
9 pursuant to 10 CFR 2.206(a), institute such a proceeding by
10 serving upon the licensee an order to show cause.

11 4. 10 CFR §50.7, "Employee Protection," prohibits discrimina-
12 tion against an employee(s) engaged in protected activity by a
13 Commission licensee, permittee, or applicant for a Commission
14 license or permit, or by contractors or subcontractors thereof.
15 The protected activities are established in §210 of the Energy
16 Reorganization Act of 1974, as amended. Said activities are
17 protected "even if no formal proceeding is actually initiated as
18 a result of the employee assistance or participation" [10 CFR
19 50.7(a)(2)]. Violations of this provision may be grounds for
20 denial, revocation, or suspension of the license, imposition of
21 a civil penalty on the applicant, or other enforcement action
22 [10 CFR 50.7(c)].

23 5. 42 U.S.C. 5851 (Energy Reorganization Act, Employee
24 Protection) provides:

25 No employer, including a Commission licensee,
26 an applicant for a Commission license, or a con-
tractor or subcontractor of a Commission licensee

1 or applicant, may discharge any employee or
 2 otherwise discriminate against any employee
 3 with respect to his compensation, terms, condi-
 4 tions, or privileges of employment because the
 5 employee (or any person acting pursuant to a
 6 request of the employee)-

7 (1) commenced, caused to be commenced, or
 8 is about to commence or cause to be commenced
 9 a proceeding under this chapter or the Atomic
 10 Energy Act of 1954, as amended [42 U.S.C. 2011
 11 et seq.], or a proceeding for the administra-
 12 tion or enforcement of any requirement imposed
 13 under this chapter or the Atomic Energy Act of
 14 1954, as amended;

15 (2) testified or is about to testify in any
 16 such proceeding or;

17 (3) assisted or participated or is about to
 18 assist or participate in any manner in such a
 19 proceeding or in any other action to carry out
 20 the purposes of this chapter or the Atomic
 21 Energy Act of 1954, as amended [42 U.S.C. 2011
 22 et seq.].

-42 U.S.C. 5851(a)

23 6. Department of Labor regulations related to these provisions
 24 define "discriminatory conduct" as any action which "intimidates,
 25 threatens, restrains, coerces, blacklists, discharges, or in any
 26 other manner discriminates against any employee [who engages in
 protected activity]." [29 CFR 24.2(b).]

7. In the leading case under §8(a)(4) of the National Labor
 Relations Act (NLRA), the Supreme Court held that the employee
 protection provision of the NLRA must be broadly construed [NLRB v
Scrivener, 405 U.S. 117, 121-126 (1972)]. The Court noted:

The complete freedom is necessary, it has been
 said, to prevent the Board's channels of information
 from being dried up by employer intimidation of
 prospective witnesses.

[ibid, at 122.]

Generally, the courts and the Secretary of Labor have noted the
 "need for broad construction of the statutory purpose" in constru-

1 ing nuclear and environmental employee protection statutes
 2 [DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983)],
 3 although a very few decisions depart from this norm. [See also,
 4 Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159
 5 (9th Cir. 1984); Wells v. Kansas Gas & Electric Co., 83-ERA-12,
 6 slip op. of SOL.]

7 8. Communications to environmental organizations or "activists"
 8 and to the news media have been held to constitute protected
 9 activity in Wedderspoon v. Milligan, 80-WPCA-1, slip op. of ALJ
 10 at 10-11 (July 11, 1980), adopted by SOL (July 28, 1980), as
 11 follows:

12 Complainant's contribution to the institution of
 13 these investigations is twofold: (1) to bring the
 14 sludge discharge information to the attention of a
 15 friend who was an "environmental activist" and could
 16 be expected to act on the information as, indeed, he
 17 did; (2.) to state the information which he had
 18 together with his views and charges against the
 19 City to a reporter of the Des Moines Register (the
 20 state's premier newspaper) whom he could expect to
 21 publish them (as the Register did over the reporter's
 22 by-line) and to bring about a full public airing of
 23 the matter. While complainant did not himself ask
 24 either the cognizant federal authorities or DEQ
 25 [Iowa Department of Environment Quality] for an
 26 investigation, the causal nexus between what he in
 fact did and the official action which resulted is
 so close as to compel the conclusion that complainant
 "caused to be... initiated [a] proceeding under this
 chapter." [Emphasis added.]

22 [See also, Mackowiak v. University Nuclear Systems, Inc., 735
 23 F. 2d 1159, 1164 (9th Cir. 1984); Scott v. Moore, 680 F.2d
 24 979 (5th Cir. 1982); Donovan v. R.D.Andersen Construction Co., 522
 25 F. Supp. 249 (D. Kan. 1982).]

26

1 9. Action which inherently discourages protected activity or
 2 intimidates employees engaged in or about to become engaged in
 3 protected activity may be sufficient in itself to demonstrate
 4 discriminatory intent:

5 [T]hat specific proof of intent is unnecessary where
 6 employer conduct inherently encourages or discourages
 7 union membership is but an application of the common
 8 law rule that a man is held to intend the foreseeable
 9 consequences of his conduct. Thus an employer's
 10 protestation that he did not intend to encourage or
 11 discourage must be unavailing where a natural conse-
 12 quence of his action was such encouragement or dis-
 13 couragement. Concluding that encouragement or dis-
 14 couragement will result, it is presumed that he in-
 15 tended such consequence. In such circumstances in-
 16 tent to encourage is sufficiently established.

17 [Radio Officers v. NLRB, 347 U.S. 17, 45 (1954).
 18 (Citations omitted.) See also, NLRB v. Erie Register
 19 Corp., 373 U.S. 221, 228 (1963); International Ladies
 20 Garment Workers Union v. NLRB, 366 U.S. 731, 738-739
 21 (1961).]

22 10. If a legitimate business or other reason for the discrimi-
 23 natory conduct asserted by management either did not exist or was
 24 not relied upon, the purported reason will be found "pretextual";

25 Examination of the evidence may reveal, however, that
 26 the asserted justification is a sham in that the pur-
 27 ported rule or circumstance advanced by the employer
 28 did not exist, or was not, in fact, relied upon. When
 29 this occurs, the reason advanced by the employer may
 30 be termed pretextual. [Wright Line, 251 N.L.R.B. 1083
 31 (1980), aff'd, 662 F. 2d 899 (1st Cir. 1981), cert.
 32 denied, 455 U.S. 989 (1982).]

33 11. Moreover, the existence of a valid rationale for the
 34 discriminatory action, if accompanied by illegal motives, is
 35 prohibited unless the employer can demonstrate that the action
 36 would have occurred even if there had been no protected activity.

37 [O]nce the plaintiff has shown that the protected

activity 'played a role' in the employer's decision, the burden shifts to the employer to persuade the court that it would have discharged the plaintiff even if the protected activity had not occurred. [Mackowiak, op cit. at 1163-64.]

"[T]he employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated because... the risk was created by his own wrongdoing." [NLRB v. Transportation Management Corp., 462 U.S. 393, 403 (1983).]

12. In applying the disparate treatment ("dual motive") and pretextual motive rules discussed above to a case of internal protected activity, the 10th Circuit court recently reaffirmed the importance of a broad interpretation of the Energy Reorganization Act's employee protection provisions:

In our view, a narrow, hyper-technical reading of § 5851 will do little to effect the statute's aim of protection. [Kansas Gas & Electric Co. v. Brock, 780 F. 2d 1505, 1517 (10th Cir., 1985)]

Similarly, in responding to a request for action pursuant to 10 CFR 2.206 filed by the Palmetto Alliance, the NRC Office of Inspection and Enforcement. [Director's Decision, June 4, 1985, Docket Nos. 50-413, 50-414.]

13. A consistent line of Department of Labor precedent recognizes that proceedings by state and local agencies are "proceedings" within the meaning of the various worker protection provisions and, therefore, contacting state or local agencies is protected activity. Hanna v. School District of Allentown, 79-TSCA-1, slip op. of SOL at 11 (July 28, 1980), rev'd on other grounds, School District of Allentown v. Marshall, 657 F. 2d 16 (3rd Cir. 1981); Haney v. North American Car Corp., 81-SWDA-1,

INCOMPLETE SENTENCES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1 slip op. of ALJ at 12 (Dec. 15, 1981), adopted by SOL (June 30,
2 1982); Fischer v. Town of Steilacoom, 83-WPC-2, slip op. of ALJ
3 at 6 (May 2, 1983).

4 STATEMENT OF FACTS

5 14. On February 26, 1986, an article reporting on NRC
6 assessments of Palo Verde security appeared in the Arizona
7 Republic, the state's largest circulation newspaper. That article
8 quoted NRC spokesmen Doug Schuster, Jim Montgomery and Greg Cook.
9 The article also quoted a spokesman from Tatt Companies Interna-
10 tional, a security contractor at Palo Verde, and ANPP executive
11 E. E. Van Brunt, who made limited comments on a recent exit
12 interview following an NRC safeguards inspection. No other plant
13 workers were directly quoted and no information was released other
14 than that attributed directly to the ANPP and NRC spokesmen. (See
15 attached Exhibit A.)

16 15. On March 4, 1986, reports appeared in the Arizona Republic
17 and the Phoenix Gazette that ANPP would conduct polygraph
18 examinations of Palo Verde security workers to determine the
19 source of an alleged "leak" of classified information to the
20 Republic by plant worker(s). (See attached Exhibit B.) ANPP
21 spokesman Dan Canady acknowledged that "no information was dis-
22 closed in news reports that would have aided would-be terrorists,"
23 according to the Gazette.

24 16. On March 5, two members of the Arizona Corporation
25 Commission, the state agency responsible for regulating Arizona
26 Public Service, released a letter to Van Brunt criticizing the

1 "lie detector" tests. "We fear that the use of lie-detector
2 tests to temporarily keep bad news about the Palo Verde nuclear
3 power plant out of the public view is a symptom of a tendency to
4 try to put the best face on the worst developments.... [W]e have
5 directed the executive secretary of the Corporation Commission to
6 review these latest developments with the consultants who will
7 undertake the audit of the Arizona Nuclear Power Project. These
8 audits are far too critical to the future of the state to tolerate
9 less-than-complete disclosure of the facts we require." (See
10 attached Exhibit C.)

11 17. According to the Arizona Republic, Region V NRC spokesman
12 Greg Cook acknowledged that the February 26 news article "was
13 clean" and that no classified information had been disclosed.
14 (See Exhibit C.)
15

16
17 18. Despite the utter lack of any positive evidence to
18 support a claim that "safeguards" information was leaked, APS has
19 based its entire justification for the polygraph exam on this
20 assumption. In sworn testimony before the Arizona Corporation
21 Commission, APS/ANPP Executive Vice President Ed Van Brunt, Jr.
22 testified that he and APS President Keith Turley determined to
23 conduct an investigation into the media contacts within less
24 than 24 hours of a telephone interview with Arizona Republic
25

1 reporter John Staggs on February 25, 1986 (the day before the
2 article based on that conversation appeared in the Republic).
3 According to Mr. Van Brunt's sworn testimony:

4 Q. (BY MR. AVILLA [state Residential Utility
5 Consumer Office counsel]) Who was involved in
6 the decision to implement lie detector testing?

7 A. [By Mr. Van Brunt] Primarily Mr. Turley and
8 myself.

9 Q. When was the decision made?

10 A. The evening of the 25th of February.

11 Q. Was it a spur-of-the-moment sort of decision
12 or were prior discussions taking place concern-
13 ing the need for such tests?

14 A. It wasn't a spur-of-the-moment decision, but
15 I only became aware of the fact -- at least in
16 my conclusion there had been some disclosure of
17 safeguard information for those who did not need
18 to have to know the afternoon of the 25th and
19 this -- and I discussed that matter with Mr.
20 Turley in the evening, indicated to him that I
21 plan to investigate that.

22 We talked about the methods we would use to
23 investigate. We agreed we would use polygraph
24 or lie detector tests as part of the that investi-
25 gation. [Arizona Corporation Commission Docket
26 No. U-1345-85-156 (Phase II) Transcript, page 984
line 23 through 985 line 15] (See, Exhibit D,
attached and fully incorporated by reference.)

19 No preliminary investigation was conducted by plant security,
20 NRC, or any other entity whatsoever prior to initiation of the
21 polygraph testing (other than Mr. Van Brunt's impression of a
22 telephone conversation with Mr. Staggs) to establish the reasona-
23 bleness of the assumption that there had, in fact, been a leak
24 of safeguards information.

25 19. APS, as stated, has based its entire rationale for the
26 polygraphs on this assumption, even though there was no such leak

1 The Government Accountability Project (GAP), counsel for a
 2 Department of Labor proceeding plaintiff in a cause related to
 3 this issue (Mr. Blaine P. Thompson), has received through DOL
 4 discovery, an NRC memorandum stating that no safeguards informa-
 5 tion was released, either in the February 26 or other newspaper
 6 articles or during the telephone conversation with Mr. Staggs.
 7 (This memorandum, hereby designated Attachment A, will be
 8 provided shortly under a separate cover.)

9 20. During a telephone conversation with Blaine Thompson on ^{Page 7}
 10 June 23, 1986, Greg Schuster (NRC Region V), referring to the ¹⁵
 11 use of polygraphs by APS, stated: "The NRC has not suggested that
 12 approach at all." In a second conversation on June 25, Schuster
 13 confirmed to Thompson: "We neither suggested nor directed to them
 14 to take this [approach]. And we looked at it with interest, but
 15 that's all."

16 21. Polygraphist's memoranda of a "pretest interview" (see
 17 ¶22 below) contradicts the narrow "safeguards" rationale and
 18 scope of the polygraphs asserted by APS. (See, Van Brunnt
 19 transcript, page 986 lines 10 through 14.) The memoranda were
 20 written over a period of more than a week to APS Corporate
 21 Security manager Frank Kroll by Molly Cannon, polygraphist for
 22 Continental Security Guards, the APS/ANPP contractor conducting
 23 the tests. The first memo is dated March 4, the date of the
 24 Thompson polygraph. The memos indicate no sustained question-
 25 ing regarding safeguards information, although a number of
 26 questions were asked regarding the employee's relations with the

CONTRARY
 TO DISPOSITION
 ?
 1

[Handwritten signature and initials]

1 Nuclear Regulatory Commission and other federal agencies and with
2 the media. The memoranda indicate that the polygraphist probed
3 Mr. Thompson for his opinions regarding the news media, whether
4 he had any contact with media representatives, and whether he
5 regarded one reporter as "the kind of sneaky reporter often
6 portrayed in movies." He was questioned about print and elec-
7 tronic media reporters, although APS has never asserted any leak
8 of safeguards information to the electronic media. (March 6
9 Memorandum.) Thompson was also questioned about his complaint
10 of harassment following a contact with the NRC. (March 4
11 Memorandum.) The memoranda demonstrate that APS/ANPP knowingly
12 questioned employees on broad issues related to their First
13 Amendment-protected contacts with the news media and (at least in
14 Mr. Thompson's case) about protected contacts with federal
15 agencies including the NRC. (See Exhibit E attached.) ~ *See*
16 22. The "pretest interview" is an integral part of any *to*
17 polygraph examination and sets the tone for the additional *to*
18 questioning that is to follow. It is also fundamental to the
19 investigatory and confession-eliciting functions of polygraphy.
20 Dr. Leonard Saxe, in being deposed for Mr. Thompson's Department
21 of Labor complaint, testified:

22 A pretest interview is perhaps the most important
23 component of a polygraph test from my perspective
24 because it sets up the psychological situation in
25 which a person responds to questions, and as I
26 said, if the pretest interview can convince
the subject that the test is valid, what
that in effect will do is make the subject feel
aroused if they are responding in a deceptive way
because they will fear detection,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

If they're innocent, unfortunately, and if they're not attempting to be deceptive, but the pretest interview doesn't convince them that this test will actually determine, show, demonstrate that they are, indeed, innocent, that they are, indeed, non-deceptive, then they may be anxious throughout the exam, and anxious in particular to the relevant questions that are asked. [DOL Case No. 86-ERA-27 Transcript of Deposition of Leonard Saxe, June 28, 1986, page 24 lines 5 through 21.] (See, attached Exhibit F.)

Dr. Saxe also noted:

Well, a pretest interview is a preliminary interview at the beginning of a polygraph examination where a polygrapher attempts to establish what is called in the literature a psychological set, appropriate psychological set.

* * *

Also, during the pretest interview the examiner will review with the examinee medical history, but more importantly, will review their -- the questions that will be tested, and it is during the pretest interview that the control question is constructed. [Saxe, op cit., page 21 lines 2 through 6 and 16 through 20.]

23. Constructing this "most important part" of the polygraph exam entirely of questions that contradict the employer's express rationale for the tests and - particularly - that relate to ERA- and First Amendment-protected activities alone is actionable on the basis of the attached memoranda.

AS WHAT? 50-7?
MAYBE, IF DIRECTED
ONLY TO A FEW.

24. It should be added that Mr. Thompson does not acknowledge the accuracy of the memoranda in all particulars, especially as regards the attribution of certain statements to him. However, there appears to be no dispute as to the subject matter of the interview as set out in the memoranda cited above. More importantly, these memos to APE Corporate Security manager Frank

1 Kroll clearly demonstrate APS management's understanding of the
 2 nature and scope of the polygraph examinations and the fact that
 3 numerous questions were being asked that clearly were illigiti-
 4 mate on the basis of APS' purported rationale.

5 25. The foregoing demonstrates that APS abused the pretest
 6 interview polygraph procedure to inquire into protected activity.
 7 In addition, the inherent nature of polygraphy, as testified to
 8 by Leonard Saxe, is such as to create a chilling effect on
 9 workers when used to inquire into the release of information, at
 10 least unless its use is very carefully circumscribed. Dr. Saxe
 11 is a recognized psychophysiological authority on polygraphy, hav-
 12 ing been principal author of the 1983 Congressional Office of
 13 Technology Assessment report "The Scientific Validity of Poly-
 14 graph Testing" and numerous other journal articles, monographs,
 15 and review pieces on polygraphy from a scientific standpoint. Dr.
 16 Saxe, having explained that the polygraph is "basically a psycho-
 17 logical test" [Saxe Deposition, op cit., page 6 line 22], com-
 18 mented on the deterrent (or "chilling") effect inherent in poly-
 19 graphy:

20 Q. ...What is the deterrent effect or the alleged
 deterrent effect of giving polygraph examinations?

21 THE WITNESS: ...One of the things that has been
 22 suggested is that the polygraph has, quote, un-
 23 quote, utility because it deters people. It makes
 24 people afraid of doing criminal or other things
 because they will be subjected to the polygraph.
 [Saxe Deposition, op cit., page 41 line 11 through
 page 42 line 5.]

25 Dr. David Lykken, a member of the Office of Technology
 26 Assessment Polygraphy Validity Advisory Board [see Saxe Depositio

IS THIS
 PROHIBITED?

1 page 52 line 22 through page 53 line 4] has written on the
2 deterrent effect of polygraphs as follows:

3 The main value of the periodic testing of
4 established employees lies in its deterrent
5 effect. [Lykken, David Thoreson, Ph.D. A
Tremor in the Blood, Uses and Abuses of the
Lie Detector, New York, 1981: page 187.]

6 Lykken adds:

7 There is reason to believe that many of the
8 "damaging admissions" elicited during poly-
9 graph screening and which form the basis for
most adverse reports to the employer, are
overstated and misleading. [ibid., page 190.]

10 Dr. Saxe continues:

11 Q. Okay. In your opinion could a polygraph exam
12 on the issue of whether an employee spoke to the
news media make an employee fearful or deterred
in going to the news media on almost any issue
or on other issues in the future?

13 THE WITNESS: That kind of question, which might
14 be a control question or under certain circum-
stances might be a relevant question, if asked
15 during a polygraph exam -- let's assume that it
is a control question and is not the issue that
16 they want to find out if somebody has done or not,
but they're using it to control for the level of
17 anxiety in general about issues -- would obviously
have an impact on the person answering that
question.

18 I also don't think, as I testified earlier,
19 that a polygraph is, even to the extent that you
can pick up arousal about specific behaviors, the
20 more you make the behavior nonspecific, talking to
the news media; that's very different than, did
21 you, on the night of June 20th, speak with X re-
porter at X restaurant and give this information.
22 The more general the issue, the more difficult it
is for the person to respond to it, to know how
23 to respond to it, and then to get a comparison
with other issues.

24 BY MR. KOHN:

25 Q. Okay. On that last statement, let's assume an
employee spoke to, say, a federal regulatory agen-
26 cy like the Nuclear Regulatory Commission, and
gave some very specific information about some

1 problems. Let's assume that then they're
2 put into a polygraph situation and they're
3 asked a question that relates to that specific
4 information that they gave, say, to a federal
5 regulatory agency, and they're asked, did you
6 give that information, but instead of saying,
7 "To the NRC," they say, "To the news media."
8 Could that cause an arousal?

9 A. Of course. If the person is thinking
10 about the information that they have about the
11 plant or whatever the employment situation is
12 and you ask a question that includes part of
13 that, they are going to be reactive. It's
14 very difficult to cognitively separate these
15 things from one another. [Saxe Deposition,
16 op cit., page 42 line 7 through 44 line 5.]

17 26. Saxe's deposition clearly indicates that APS' polygraph
18 questions (as demonstrated by the Cannon memoranda) were inap-
19 propriate to their purported narrow purpose. Moreover, they
20 were not the kind of questions that are likely to produce
21 valid investigatory results through use of the polygraph, inasmuch
22 as they involve "cognitive" rather than behavioral issues:

23 Q. Okay. Let's assume the interviewee is a
24 confidential informant, and he's anxious about
25 being detected as an informant, thinking in-
26 formant just to anybody, a confidential inform-
27 ant, and he has provided the media with certain
28 information, but he's done it confidentially.
29 He's specifically requested the media not tell
30 anyone who he is.

31 If he was asked just his general opinion of
32 the news media, what type of -- what may occur
33 just by asking that type of question? He's
34 confidential; he has given information to the
35 news media confidentially, and he's just asked,
36 "hey, what do you think of the press" in a
37 polygraph setting. What type of impact on
38 validity could that have?

39 A. Well, again, I don't think that in a poly-
40 graph exam, that any of these issues can the
41 polygraph detect deceptiveness. The issues are
42 too cognitive and not behavioral..

1 I think the problem with these questions of
2 that sort in a polygraph exam is that they
3 illustrate how the polygraph is not a physio-
4 logical detection tool, but rather an inter-
5 rogation tool, and it really depends on what
6 the examiner is using those kinds of ques-
7 tions to establish.

8 They may want to use it to establish that
9 the examiner has information about all of
10 the things that this person has done, and so
11 they might as well confess. So they might as
12 well tell the whole story because they've got
13 information on most of it anyway. It really
14 would depend on how the polygrapher used a
15 question like that.

16 There are obviously circumstances under
17 which a question like that could be threaten-
18 ing and could interact with the subject's be-
19 lief that the exam is going to clear him or
20 not clear him. [Saxe Deposition, op cit.,
21 page 46 line 20 through page 48 line 10.]

22 27. Saxe also dealt with circumstances similar to those in
23 the individual case of Blaine Thompson, the impact of a poly-
24 graphist's pre-impression of the subject's guilt or innocence
25 on the assessment of test results, and other relevant issues.
26 Two critical points emerge regarding APS' use of polygraphs:
27 1.) the tests - particularly using the sort of questions in the
28 Cannon memos - have no validity for investigating the narrow
29 "behavioral" issue of whether specifically "safeguards" informa-
30 tion was released, although they could easily lead to "false
31 positive" identification of particular workers, including those
32 engaged in protected activities; 2.) the tests - again, particu-
33 larly given the sort of questions in the Cannon memo - could have
34 some "utility" in conducting a broader investigation aimed at
35 worker disclosure in general, both in eliciting what Lykken

1 refers to as "damaging admissions" of collaterally related
 2 behavior (such as disclosure of non-safeguards information or
 3 protected contacts with government agencies) and in creating a
 4 "deterrent" effect. Given the improperly broad scope of the
 5 questions in the Cannon memoranda, that deterrent effect would
 6 obviously extend to a "chilling" effect on contacts with print
 7 and electronic media reporters in general and with government
 8 agencies (the subject matter of the questions). In short, the
 9 tests as conducted by APS were inappropriate to their purported
 10 legitimate motive, but they were appropriate to the illegitimate
 11 motives of chilling worker disclosure and retaliating against
 12 worker contacts with the media.

13 27. On June 12, 1986, the Arizona Corporation Commission
 14 (which had previously expressed concerns about the potential
 15 chilling effect of the polygraphs on plant workers offering
 16 information to the Commission's Palo Verde auditors) held
 17 informal hearings on the polygraph issue and plant worker
 18 disclosure. At that meeting, Commission Chairman Renz D.
 19 Jennings stated the common sense of the matter: "It may be that
 20 you can put out all these fine [training] videos, and they may
 21 be very visible, but if you're saying... 'If we catch you squeal-
 22 ing or leaking information, we're going to strap you to a lie
 23 detector,' that can have a very chilling effect." (Exhibit G.)

24 28. All three commissioners indicated that Palo Verde plant
 25 workers had come to the Arizona Corporation Commission with
 26 information on plant conditions because they feared retaliation

THIS
ISSUE
MAIN
ISSUE

1 if they complained through to plant management or NRC. Both
 2 commissioners Weeks and Megdal indicated that they had been
 3 contacted at least one worker who based his fear of retaliation
 4 specifically on the polygraphs.

5 29. The Coalition for Responsible Energy Education has been
 6 contacted by plant workers who have indicated that the poly-
 7 graphs have produced a chilling effect or have increased pre-
 8 existing concerns about retaliation. Similar information has
 9 been received from media representatives and attorneys in contact
 10 with plant worker informants. In addition, the Coalition's
 11 ability to work with informants has been directly affected in
 12 some instances. (Exhibit H, attached and fully incorporated.)

13 30. The June 10, 1986, Phoenix Gazette carried an account by
 14 reporter Victor Dricks of an anonymous worker's claim of
 15 employment discrimination. The reporter has had the Palo Verde
 16 assignment for the Gazette, a major circulation newspaper, since
 17 approximately 1982. The article states:

18 The chemist asked not to be identified,
 19 saying that although he has found employment
 at another nuclear plant, he fears reprisals.

20 He said the recent institution of poly-
 21 graph tests of Palo Verde employees suspect-
 ed of providing information to the news
 22 media has made many workers fearful of
 talking to reporters.... (Exhibit I, attached.)

23 31. Immediately following the implementation of the poly-
 24 graph tests at Palo Verde, the Arizona Republic (March 4, 1986)
 25 reported:

26 Of employee reaction to the polygraphs, the
 [security worker] source said, "They're

CHILLING
EFFECT

1 damned angry about it." Another charac-
2 terized use of the tests as "Gestapo
3 tactics." (Exhibit B)

32. APS/ANPP has asserted that it will use the tests in the
4 future whenever necessary. (Exhibit J.)

33. APS has publicized the use of the polygraphs, thus
5 magnifying the chilling effect. In one instance, APS issued a
6 press release to all local media, announcing employment actions
7 taken against one security worker who had submitted to the test.
8 (Exhibit K.)

34. Within the context of the polygraphs, a collateral issue
9 of disparate action in their application has been raised by one
10 former plant security captain, Blaine P. Thompson. Thompson has
11 filed a Department of Labor complaint based on a continuing
12 pattern of discrimination in retaliation for his December, 1985,
13 contact with the NRC. Hearings before an administrative law
14 judge are currently scheduled for October 20.

35. In essence, Mr. Thompson alleges that plant management
15 used the polygraphs to continue its harassment of him, citing
16 disparate treatment in a number of instances, including the
17 process by which he was selected as a polygraph subject. In
18 addition, Mr. Thompson has stated his conviction that the more
19 general motive for the tests is to create a chilling effect on
20 worker disclosure to the media:
21 worker disclosure to the media:

22 ...[T]he APS/ANPP official justification for
23 polygraph utilization in this issue lacks
24 credibility. What is apparent, and appears
25 valid is that the company officials utiliza-
26 tion of the polygraph is an intimidating and
 harassing measure to prevent ANPP employees

WHAT'S
SAYING
THEY
ARE

SEVERAL
ISSUES

1 from disclosing publicly, adverse nuclear
2 plant conditions for which these officials
3 are responsible, and for which they have
4 failed to take prompt and necessary cor-
5 rective actions. [Thompson to DOL Wage &
6 Hour (Phoenix): "Discriminatory Acts and
7 Retaliation," March 26, 1986.]

8 36. Accordingly, Mr. Thompson has declined to submit to a
9 voluntary polygraph test, in part on principle due to his
10 conviction that it is being used to produce a chilling effect.
11 In addition, he fears its misapplication to justify additional
12 retaliatory action in his case, which stems from a December,
13 1985, contact with the NRC. Finally, he has, for medical
14 reasons, been unable to produce a valid polygraph chart through-
15 out the period in question. The particulars of Mr. Thompson's
16 case are described in detail in his Department of Labor case file
17 (Case No. 86-ERA-27) and will not be recounted here except as
18 they appear especially relevant to the subject of this petition.

19 37. Blaine Thompson is a CREE (Coalition for Responsible
20 Energy Education) witness who has been subjected to continued
21 harassment, pre-dating his initial contact with CREE. Mr.
22 Thompson dates this harassment by APS/ANPP from December, 1985,
23 as discussed below. A key element of disparate action in the
24 Thompson case - his selection as a polygraph subject - also
25 raises questions about the selection criteria employed by APS
26 and, therefore, the validity of the polygraph procedure in
general. Mr. Thompson, in fact, was absent from the plant on the
day of the NRC Exit Interview quoted in the original, February
26 Arizona Republic article. Therefore, APS/ANPP had little or

1 no cause to suspect that Thompson could have been the source of
 2 the alleged leak related to that newspaper story. Thompson did
 3 not attend the Exit Interview due to an "administrative suspen-
 4 sion" pending completion of an ANPP investigation which he and
 5 our organization also regard as retaliation for his NRC contact
 6 and, in fact, another example of disparate treatment. Based on
 7 the foregoing and on various APS/ANPP representations, it is
 8 clear that: 1.) at least one employee (Thompson) who did not fit
 9 the APS/ANPP-established criteria for the polygraph (attendance
 10 at the Exit Interview) was selectively subjected to polygraphy
 11 regarding contacts with the media and federal agencies including
 12 the NRC; 2.) it appears probable that other individuals attending
 13 a training session attended by Thompson (APS/ANPP's purported
 14 rationale for Thompson's selection) were not polygraphed unless
 15 they also attended the Exit Interview; 3.) the published
 16 accounts attributed to APS/ANPP and representations made by APS
 17 to the Arizona Corporation Commission regarding the number of poly
 18 graph subjects vary over a range of 26 to 31 individuals, yet
 19 neither Mr. Thompson nor other worker informants are able to
 20 calculate a probable attendance figure for one or both of the
 21 meetings in question which corresponds to any number in that
 22 range, raising the probability that polygraphs were based on
 23 selection criteria other than those publicly advanced by APS/ANPP
 24 4.) apparently little if any allegedly disclosed "safeguards"
 25 information was discussed at the training session forming the
 26 alleged basis for Mr. Thompson's selection. [Thompson March 26

See
 HAYDEN
 LTR
 BTB
 4/17/67
 APS
 DISPUTES
 THIS.

1 memorandum, op cit., pages 2.]

2 38. Worker informants also attest to a number of incidents
3 involving suspected or possible tampering or sabotage at the
4 plant and drug use and sale incidents in which ANPP apparently
5 resisted using polygraphs in an investigatory context. APS has
6 claimed that it has used polygraphs only on plant security
7 employees. (See, attached Exhibit L.) However, CREE's inform-
8 ants are convinced that there was no use of polygraphs in at
9 least the majority of such cases, and, moreover, that, if ever
10 used, their use was confined to contract security workers.
11 Excepting pre-employment screening, CREE is informed that no
12 ANPP Security Department employees have been polygraphed prior to
13 the February-March tests. Mr. Thompson has indicated that ANPP
14 refused to use polygraphs even after a preliminary investigation
15 into the incident of aberrant behavior and sexual harassment and
16 assault which prompted Thompsons' December, 1985, NRC contact.
17 [See, 86-ERA-27, op cit., Memorandum from Thompson to Phoenix
18 DOL of February 27, 1986: "Subject: Discriminatory Acts and
19 Retaliation, page 18.]

20 39. On March 4, 1986, acting under the impression conveyed to
21 him by Doeg Nelson that the procedure was mandatory, Mr. Thompson
22 submitted to a polygraph examination consisting of the "pretest
23 interview" discussed above. Mr. Thompson recounts:

24 I did sign the authorization form and was about
25 to proceed with the test when the polygraphist
26 advised me that she had decided not to test me
due to my heart condition and my inability to
produce valid and reliable test results. From

1 this point on, March 5, 1986 through March
2 10, 1986, there did occur a series of events
3 in which APS/ANPP management personnel did
4 attempt to deceive, coerce, and forcefully
5 persuade me to take the polygraph exam. [Ex-
6 hibit citations omitted.]

7 By contrast, the same management person-
8 nel have stated publicly that the tests were
9 voluntary and that "no retribution has been
10 taken against those that refused." [Thompson
11 March 26 Memo, op cit., page 3; see also, page
12 2.]

13 40. Subsequent to March 10, 1986, Captain Thompson has been
14 subjected to continued harassment by APS/ANPP, culminating in a
15 threat of demotion for failure to take the polygraph from APS/
16 ANPP legal counsel. [Exhibit L.]

17 41. In addition, Palo Verde security officer Mike Deblo was
18 transferred and demoted as a result of his performance on the
19 polygraph test -- although APS/ANPP has publicly stated that it
20 did not accuse him of disclosing safeguards information to the
21 media. [See, Exhibit K.] Thompson recounts:

22 On March 17, 1986, Mike Deblo was demoted from
23 Security Operations Supervisor to Corporate
24 Security Gaurd, a pay cut of thousands of dol-
25 lars, and reassigned outside of ANPP. His de-
26 motion was supposedly based on poor and impro-
per supervisory performance.* [Exhibit cita-
tions omitted.]

On March 18, 1986 Mike Deblo resigned from
his employment with A.P.S. [Thompson March 26
Memo, op cit., pages 5-6.]

Subsequent to his demotion, Mr. Deblo has felt initimidated or
otherwise prohibited from sharing information with Mr. Thompson
in preparation of the latter's DOL case.

* But, see Exhibit K.

APPROXIMATE
INCIDENT
DATE
LOCATION?

1 42. On or about May 19, 1986, APS/ANPP officials apparently
2 refused to permit Phoenix Gazette reporter Victor Dricks to
3 speak with and Thompson to phone that reporter/regarding his
4 DOL complaint. [Exhibit M, attached.]

5 43. On March 16, 1986, Doeg M. Nelson placed Captain Thompson
6 on "Temporary Disability Reassignment" outside Palo Verde, citing
7 "medical treatment for a stress, anxiety-related disability."
8 [Exhibit N, attached.] Nowhere in the Nelson correspondence are
9 the polygraphs mentioned. However, the treatment referred to was
10 related to Thompson's medical inability to produce a valid poly-
11 graph chart. [Exhibit O, attached.] Moreover, Thompson, in
12 attempts to resolve the reassignment issue clearly informed APS/
13 ANPP management of his conviction that the medical treatment and
14 health conditions in question in no way affected his ability to
15 continue to perform his plant security functions and, further,
16 that the reassignment was suggestive of disparate treatment.
17 [Exhibit O.]

18 44. In any event, APS' purported rationale for Thompson's re-
19 assignment was demonstrated to have been pretextual by a letter
20 from APS/ANPP counsel Mr. William R. Hayden to Mr. Thompson's
21 counsel Stephen M. Kohn dated July 3, 1986, in which Hayden
22 threatens permanent reassignment and potential demotion due to
23 Captain Thompson's reluctance to submit to a voluntary polygraph
24 examination. [Exhibit L.]

25 45. Throughout the period of his "Temporary Disability Reas-
26 signment," Mr. Thompson and his counsel attempted to conciliate,

1 and Mr. Thompson sought a resolution of the issues raised by APS.
2 Pursuant to a confidentiality agreement between the parties, CREE
3 does not possess information on the unsuccessful efforts to
4 conciliate a settlement of Thompson's Department of Labor com-
5 plaint; however, on multiple occasions, Mr. Thompson indicated
6 his willingness to fully cooperate with any APS/ANPP investiga-
7 tion into "safeguards" violations, excepting his unwillingness to
8 voluntarily submit to the polygraph examination. [Exhibit P.]
9 On June 6, 1986, Thompson informed ANPP that he had been removed
10 by his physician from the prescription drug referred to in his
11 Temporary Disability Reassignment and placed instead on a beta
12 blocker without any negative side effects whatsoever. [ibid.]
13 Accompanying the June 6 letter, Thompson submitted to plant
14 management documentation from two physicians authorizing him for
15 full duty status without restriction. Thompson received no
16 response from plant management, and on June 24 phoned ANPP Plant
17 Manager Joe Bynum, who informed him that the reassignment was "no
18 longer a medical matter [but] a legal matter," and advised him
19 that further communication would be between opposing counsel.
20 Whereupon, on July 3, ANPP counsel Hayden wrote to Mr. Kohn,
21 disclosed the apparent real motive behind the original "disabil-
22 ity" reassignment:

23 Mr. Thompson's unwillingness, and more import-
24 antly his inability to be examined regarding
25 the possible unauthorized disclosure of security
26 information, precludes ANPP from fulfilling its
obligation to complete the present security in-
vestigation. [Exhibit L, page 2.]

1 46. Thus, the originally purported reason for Captain
 2 Thompson's reassignment must be regarded as a mere pretext.
 3 The interim categorization (Bynum's "legal matter") may violate
 4 42 U.S.C. 5851(a)(1). The rationale for the permanent reas-
 5 signment and probable demotion threatened by Hayden:

- 6 • clearly contradicts previously asserted
pretexts for Thompson's reassignment;
- 7 • contradicts APS/ANPP's previous assertions
8 that no retaliation would be visited on
employees exercising their right to refuse
9 the polygraph;
- 10 • is internally inconsistent inasmuch as Hay-
den's letter asserts the polygraphs are
11 "voluntary" yet also asserts that willing-
ness and ability to submit to polygraphs
12 is a condition of (impliedly) continuing
employment;
- 13 • fails to substantiate in any way its claim
(contradicted by the Schuster memo, the
14 absence of a preliminary investigation,
etc.) of "reasonable cause" sufficient
15 to justify APS/ANPP's use of polygraphs
on such a scale in such a sensitive con-
16 text;
- 17 • in its claim of an "obligation" to complete
its investigation completely and willfully
18 ignores the availability of other investi-
gatory means, Thompson's express willing-
ness to cooperate with such investigations,
19 and the licensee's equal responsibility
under 10 CFR 50.7 to refrain from intimidat-
20 ion of actual and potential whistleblowers;
- 21 • expresses an improper intention to penalize
the employee for declining to submit to a
22 procedure that is: inherently discrimina-
tory in its chilling effect on protected
23 activity (Saxe) and based on a transparently
pretextual rationale (Cannon memoranda).

24 APS/ANPP's asserted "condition of employment" is a pretextual
 25 invention designed to allow the licensee to complete its illicit
 26 fishing expedition in the area of worker disclosure. It also

1 appears to be a pretext to prevent Captain Thompson's return to
 2 Palo Verde to foreclose future protected actions in the interest
 3 of plant safety and to punish previous protected activity with
 4 the same aim.

5 47. As a result of Thompson's removal from Palo Verde and
 6 the chilling effect of the polygraphs, the Coalition for
 7 Responsible Energy Education was deprived of the full assistance
 8 of a potentially invaluable witness in support of its 2.206
 9 petition on ANPP management competence and character, which was
 10 pending before the Office of Nuclear Reactor Regulation at the
 11 time the polygraphs were implemented. It had been the Coali-
 12 tion's intention to supplement that petition with additional
 13 allegations concerning the inadequacy of plant security, which,
 14 it had become increasingly apparent to CREE through its review of
 15 NRC published documents and other information, is one of the
 16 areas of most marked deficiency within ANPP. CREE's petition has
 17 been denied recently by Director's Decision, even though the
 18 proposed \$100,000 for Palo Verde security deficiencies emanating
 19 from the inspections described in the February 26 Arizona Repub-
 20 lic article substantiates the Coalition's concerns in this area.
 21 In addition to the restrictions imposed on this witness, numerous
 22 other channels of important information have been closed by APS/
 23 ANPP's improper use of polygraphs to affect media disclosures.
 24 [See also, Exhibit H.]

25 48. APS' decision to implement polygraphs at Palo Verde came
 26 during a period of sustained and pointed criticism of plant man-

IS THIS
 THE ONE
 WE ANSWERED
 7 pp.

Before
 July '86

1 agement competence, not only by the Coalition, but by the NRC and
2 others. During the two months immediately preceding the deci-
3 sion, the Coalition had focused increasing media attention on the
4 security area in particular. CREE also focused on this area in
5 its 2.206 petition, filed in January, 1986. Moreover, APS found
6 (and finds) itself plagued by a continuing rash of apparent
7 tampering incidents. The NRC during this period was increasingly
8 critical of plant security performance. Finally, the utility was
9 facing its first major Palo Verde rate case before the Arizona
10 Corporation Commission and the Commission's intensive, four-state
11 audit of Palo Verde management prudence. Corporation Commission-
12 ers Megdal and Weeks spoke from experience when they expressed
13 their concern that the polygraphs were "a symptom of a tendency
14 to try to put the best face on the worst developments." [Exhibit
15 C.]

16 49. As another symptom of that tendency - one indicative of
17 APS' temperament at the time of the incidents complained of here-
18 in - within 48 hours of the initiation of the polygraph exams at
19 Palo Verde, APS President Mark De Michele issued, to "all
20 employees" a correspondence titled "Responding to Investigative
21 Inquiries" which stated: "APS does want each employee to make
22 necessary inquiries [of APS Risk Management Services] before
23 discussing incidents or company policies with outside attorneys or
24 investigators...." [Exhibit Q attached.]

25

26

1 CONCLUSIONS OF LAW

2 50. 10 CFR 50.7 (42 U.S.C. 5851) prohibits licensee action
3 which discriminates against protected activity "to carry out the
4 purposes of the [Energy Reorganization Act]."

5 51. Petitioner submits that Arizona Public Service Company/
6 Arizona Nuclear Power Project did knowingly and intentionally
7 violate these provisions by implementing polygraph testing of
8 plant employees as a means of retaliation for non-prohibited
9 disclosure of negative information on plant conditions to the
10 news media; and

11 52. APS/ANPP further implemented the polygraph testing of
12 employees as a means of intimidating potential whistleblowers
13 in the the plant security area and elsewhere.

14 53. Such a "chilling effect" on worker disclosure has occurred
15 The dimensions of this effect are impossible to quantify. Con-
16 cern has been expressed that the continuing four-state audit of
17 Palo Verde and other Arizona Corporation Commission investigation
18 may have been affected, as well as actual and potential worker
19 contacts with the NRC, the media, and local environmentalists.

20 54. The publication of information in the Arizona Republic
21 and other local media - in addition to continuing NRC inspection
22 and enforcement activities - has caused actions to be commenced
23 before the Arizona Corporation Commission.

24 55. Petitioner further submits that APS/ANPP knowingly and
25 intentionally utilized the polygraph testing as a means of furth
26 retaliation against and intimidation and harassment of Captain

ISSUES
X

2ND
ISSUES
X

ETC

3RD
ISSUES

1 Blaine P. Thompson for that employee's December, 1985, contact
 2 with the Nuclear Regulatory Commission, which caused an investi-
 3 gation to be initiated into an incident of alleged aberrant
 4 behavior affecting plant security and safety.

5 56. APS/ANPP further violated the provisions cited by its
 6 actions against Supervisor Mike Deblo.

7 57. The purported rationale of protection of "safeguards"
 8 information from unauthorized disclosure is unsupported by any
 9 showing of reasonable cause sufficient to justify the licensee's
 10 actions and is a mere pretext for prohibited discriminatory
 11 conduct; and

12 58. To the extent any such concern was a factor in motivating
 13 any actions taken by APS/ANPP it was part of a dual motive includ-
 14 ing the prohibited discrimination against employees engaged in or
 15 about to engage in protected activities.

16 59. APS/ANPP's actions demonstrate the pretextual nature of
 17 their purported motive and a reckless disregard for their obli-
 18 gations under 10 CFR 50.7; and

19 60. APS/ANPP's actions and comments demonstrate a reckless
 20 disregard for the inherently discriminatory nature of their
 21 conduct.

22 61. The ultimate harm caused by the licensee's improper con-
 23 duct perhaps was best summarized by the Government Accountability
 24 Project in an initial communication with the Department of
 25 Labor regarding the Thompson case. GAP wrote:

26 The actions of Arizona Public Service, if upheld,
would chill the speech of atomic energy employees

41 TO
ISSUE

APR 13

APR 13

APR 13

APR 13

APR 13

throughout the country as they learn that their First Amendment right to speak to reporters is no longer protected in all circumstances. [Exhibit R, attached.]

62. So sweeping and insidious is the "deterrent" effect and blatant and reckless were the licensee's discriminatory actions that worker disclosure has been forever tainted at the Palo Verde Nuclear Generating Station. Therefore, Petitioner requests the strongest possible relief. Only the strongest possible sanctions can ever remove the taint the licensee's outrageous behavior has cast over Palo Verde worker disclosure.

63. §50.7(c) provides:

A violation of paragraph(a) of this section by a Commission licensee, [or] permittee, .. may be grounds for:

- (1) Denial, revocation, or suspension of the license.
- (2) Imposition of a civil penalty on the licensee or applicant.
- (3) Other enforcement action.

RELIEF REQUESTED

64. WHEREFORE, on the foregoing grounds and authorities, the Petitioner, Coalition for Responsible Energy Education, hereby requests the following:

- 1 • Imposition of the most stringent civil penalties against ANPP as licensee of both Palo Verde Unit Nos. 1 and 2;
- 2 • Require that ANPP be made to post, pursuant to 10 CFR 50.7(e) notices to employees re-asserting the protections afforded under 10 CFR 50.7 and the Energy Reorganization Act and apologizing for the violation of those provisions in the instant case;
- 3 • The licensee's improper conduct having cast

Handwritten: Amend. Petitioner in Section

Handwritten: CRBE WANTS

Handwritten: 1.

Handwritten: 2. A. June

Handwritten: D.B. O'Connell

Handwritten: NIX Amendment 26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

an indelible taint on Palo Verde worker disclosure, denial/revocation of all Palo Verde licenses.

• Such other, additional actions as the NRC may deem necessary or appropriate.

RESPECTFULLY SUBMITTED this 16th day of July, 1986.

BY: *Myron L. Scott*

MYRON L. SCOTT
(Intervention Coordinator)
on behalf of: The Board of
Directors,
COALITION FOR RESPONSIBLE
ENERGY EDUCATION

Lyn M. McKay

LYN MCKAY
President

Barbara S. Bush

BARBARA S. BUSH
Executive Director
C.R.E.E.
315 W. Riviera Drive
Tempe, AZ 85282
(602)968-2179

U.S. Department of Labor

Office of Administrative Law Judges
211 Main Street
San Francisco, California 94105



(415) 974-0514
FTS 8 454-0514

Suite 600

DATE: May 18, 1987
CASE NO. 86-ERA-27

IN THE MATTER OF

BLAINE P. THOMPSON
Complainant

v.

ARIZONA PUBLIC SERVICE
COMPANY/ARIZONA NUCLEAR
POWER PROJECT
Respondent

and

COALITION FOR RESPONSIBLE
ENERGY EDUCATION
INTERVENOR

Stephen M. Kohn, Esq.
Michael D. Kohn, Esq.
For the Complainant

William R. Hayden, Esq.
For the Respondent

Before: ALEXANDER KARST
Administrative Law Judge

DECISION AND ORDER

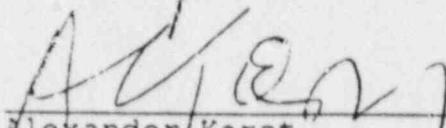
This is a proceeding arising under Section 210 of the Energy Reorganization Act, 42 U.S.C. §5851, regarding three complaints filed by Complainant Blaine P. Thompson against Respondent Arizona Public Service Company/Arizona Nuclear Power Project dated February 27, 1986, March 25, 1986, and September 9, 1986.

On May 15, 1987, the parties submitted a Joint Motion with an attached Settlement Agreement requesting approval for settlement of this case.

IT IS HEREBY ORDERED accepting and approving the Settlement Agreement attached to this Decision. The Settle-

ment Agreement constitutes my findings of fact and conclusions of law.

DATED this 18th day of May, 1987.



Alexander Karst
Administrative Law Judge

04WRH0668A

Blaine P. Thompson
4910 W. Diana
Glendale, AZ 85302

SERVICE SHEET

86-ERA-27 & 87-ERA-1

Steven Kohn, Esq.
Michael Kohn, Esq.
Gov't Accountability Project
1555 Connecticut Ave., N.W.
Washington, D.C. 20036

#827 325

Arizona Public Service Co.
Arizona Nuclear Power Project
411 North Central
Phoenix, AZ 85004

Ed VanBrunt
Executive Vice President
Arizona Nuclear Power Project
11226 N. 23rd Ave.
Phoenix, AZ 85029

Myron Scott, Secretary
Intervention Coordinator
Coalition for Responsible
Energy Education
315 W. Riviera Dr.
Tempe, AZ 85282

William R. Hayden, Esq.
Rebecca Winterscheidt, Esq.
Snell & Wilmer
3100 Valley Bank Center
Phoenix, AZ 85073-3100

#827 324

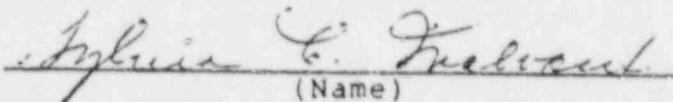
Administrator
Wage & Hour Division
USDOL - ESA
Room S-3502, FPB
200 Constitution Ave., N.W.
Washington, D.C. 20210

Cornelius Donoghue
Deputy Associate Solicitor
O/Solicitor - USDOL
Suite N-2620, FPB
200 Constitution Ave., N.W.
Washington, D.C. 20210

Nuclear Regulatory Commission
O/Inspection & Enforcement
Washington, D.C. 20555

Monica Gallagher, Assoc. Solicitor
C/Solicitor - USDOL - FLS
200 Constitution Ave., N.W.
Room N-2716
Washington, D.C. 20210

Area Director
USDOL - Wage & Hour Div/E3A
3221 North 16th St., #301
Phoenix, AZ 85016


(Name)

MAY 18 1987

(Date)

- 1 -

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:)	
)	
BLAINE P. THOMPSON,)	
)	
Complainant,)	Case No. 86-ERA-27
)	
vs.)	
)	
ARIZONA PUBLIC SERVICE)	
COMPANY/ARIZONA NUCLEAR)	SETTLEMENT AGREEMENT
POWER PROJECT,)	
)	
Respondent,)	
)	
and)	
)	
COALITION FOR RESPONSIBLE)	
ENERGY EDUCATION,)	
)	
Intervenor.)	
_____)	

This Settlement Agreement constitutes a final and comprehensive resolution of Mr. Blaine Thompson's complaints against Respondent Arizona Public Service Company/Arizona Nuclear Power Project (APS/ANPP) to the Department of Labor (DOL) of February 27, 1986, March 25, 1986, and September 9, 1986, filed under Section 210 of the Energy Reorganization Act (ERA). Submitted simultaneously herewith is a joint motion to the Administrative Law Judge (ALJ) requesting approval of this full and final Settlement Agreement of the parties' claims.

1. Mr. Thompson voluntarily withdraws his DOL complaints of February 27, 1986, March 25, 1986, and September 9, 1986, and agrees not to file any additional or

supplemental claims under Section 210 of the ERA against APS/ANPP regarding any event or incident which occurred on or before the date of execution of this Settlement Agreement.

2. This settlement shall not be construed as an admission of any wrongdoing by any of the parties, nor shall it be construed as an adjudication on the merits for or against either party. The Agreement settles all claims that Mr. Thompson had, or may have had, under Section 210 of the ERA, 42 U.S.C. §5851, against Respondent from March 1, 1982 until and through the date this settlement is ratified by the parties, and Complainant agrees not to file Section 210 charges based on any conduct by Respondent during this time period.

3. Within 10 days of the parties' execution of this Agreement, Respondent will place \$40,000.00 in an interest bearing insured money market escrow account. Within two working days of the date that Respondent receives official notice that the Secretary of Labor has approved this settlement, Respondent will pay Complainant \$30,000.00 out of the escrow account and all interest accrued to date. The remaining \$10,000.00 will be paid to Complainant in three equal annual installments of \$3,333.33 on June 1, 1988, June 1, 1989, and June 1, 1990, together with accrued interest to date, subject to the following conditions. First, in order to be entitled to any installment or portion thereof, Complainant must have remained employed with Respondent during

the entire twelve months preceding the installment due date. Second, if prior to any installment due date, Complainant has voluntarily transferred out of the position provided for in paragraph 4 and into a position that provides a salary range comparable to that of Security Shift Captain at Palo Verde, Respondent will not be obligated to pay the remaining installment(s). The foregoing lump sum payments are in settlement of all claims settled by this Agreement, including claims for costs and attorneys fees.

4. Respondent shall transfer Thompson to a position comparable in salary to his position of Security Shift Captain while at Palo Verde. For this purpose, Respondent will assume that Thompson would have received a "Superior" performance review at Palo Verde in December, 1986 and the corresponding 6.5% increase in salary. The parties agree that such a comparable position is Revenue Protection Investigator in the Energy Diversion Department at the salary of \$3,404.00 per month. Complainant's salary will be administered pursuant to Respondent's normal salary administration program. Thompson will not receive a performance review for the period from the date of his transfer to the APS Security Department until his transfer to the Energy Diversion Department. Complainant forever foregoes his rights to reinstatement to any position within the Palo Verde nuclear facility.

5. Respondent will not retaliate or discriminate against Thompson because he filed Section 210 charges against Respondent.

6. Respondent shall permanently remove from Complainant's personnel file or any other file related to Complainant:

a) Complainant's written performance review dated January 15, 1986, and substitute in its place the performance review prepared by Michael Deblo dated December 8, 1985, fully executed by appropriate Company officials.

b) Any and all references to the February 1986 investigation into charges by Officers Reighard and Johnson.

c) The two disciplinary warnings issued to Complainant since his transfer to the APS Security Department.

d) Any reference to the reasons for Complainant's temporary or permanent transfer outside of the ANPP Security Department.

e) The "confidential" memorandum file prepared by Doeg Nelson concerning Blaine Thompson dated January 15, 1986.

7. It is expressly understood that in no more than seven days after the execution of this Agreement by both

parties, Thompson will be tentatively transferred to the Energy Diversion Department pursuant to paragraph 4 above. Said transfer shall become final upon the approval of the Settlement Agreement by the Secretary of Labor. All other obligations to perform the covenants contained herein are contingent upon the Secretary of Labor approving the parties' Settlement Agreement.

8. Respondent agrees that in responding to future employment inquiries, consistent with its personnel policies, it will confirm only Thompson's dates of employment, rates of pay, and job titles. For purposes of disclosing Thompson's rate of pay, Respondent's records will reflect that he did not receive a reduction in salary when he was transferred in August, 1986. Respondent further agrees to advise Thompson's former supervisors (i.e., D. Nelson, F. Kroll, G. Tranburg, W. Fernow & C. Kelly) that, consistent with Respondent's policy, all employment inquiries received by them should be referred to the Personnel Department for response.

9. This Agreement constitutes the sole and entire agreement between the parties hereto and supersedes any and all understandings and agreements made prior hereto. There are no collateral understandings, representations, or agreements other than those contained herein. It is understood and agreed that the execution of this Agreement by Respondent is not to be construed as an admission of liability on its

part to Complainant, but is a compromise and settlement of
disputed claims.

DATED this 15th day of May, 1987.

APPROVED AS TO FORM:

Stephen M. Kohn 5/14/87

Stephen M. Kohn
Michael D. Kohn
Attorneys for Complainant

COMPLAINANT

Blaine P. Thompson May 15, 1987
Blaine P. Thompson

RESPONDENTS

ARIZONA PUBLIC SERVICE
COMPANY
ARIZONA NUCLEAR POWER
PROJECT

William R. Hayden 5/15/87

William R. Hayden
Rebecca Winterscheidt
Attorneys for Respondent

By: J. Selmes 5/15/87
Its: VICE PRESIDENT

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: September 17, 1987
CASE NO. 36-ERA-27

IN THE MATTER OF

BLAINE P. THOMPSON,

COMPLAINANT,

v.

ARIZONA PUBLIC SERVICE COMPANY/
ARIZONA NUCLEAR POWER PROJECT,

RESPONDENT,

and

COALITION FOR RESPONSIBLE ENERGY
EDUCATION,

INTERVENOR.

BEFORE: THE SECRETARY OF LABOR.

ORDER APPROVING SETTLEMENT

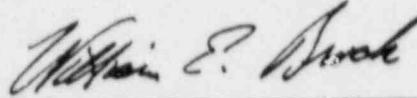
On May 18, 1987, Administrative Law Judge (ALJ) Alexander Karst issued a recommended Decision and Order (D. and O.) approving a settlement agreement entered into by the parties on May 15, 1987. By letter dated June 22, 1987, counsel for Complainant requests my expeditious approval of the parties' settlement agreement.

I have reviewed the terms of this agreement and find that the agreement is fair, adequate and reasonable. I, therefore,

agree with the ALJ's recommendation,^{1/} and I approve the settlement.

Accordingly, this case is DISMISSED WITH PREJUDICE.

SO ORDERED.



Secretary of Labor

Washington, D.C.

^{1/} The ALJ states that the settlement agreement constitutes his "findings of fact and conclusions of law." D. and O. at 2. Where a complaint is resolved as a result of a voluntary compromise by the parties, it is unnecessary for an ALJ to make findings of fact and reach conclusions of law. Moreover, it is inappropriate here inasmuch as the parties have agreed that "[t]his settlement shall not be construed as an admission of any wrongdoing by any of the parties, nor shall it be construed as an adjudication on the merits for or against either party." Settlement Agreement at 2, paragraph 2.

CERTIFICATE OF SERVICE

Case Name: Blaine P. Thompson, Complainant v. Arizona
Public Service Company/Arizona Nuclear Power
Project, Respondent and Coalition for
Responsible Energy Education, Intervenor.

Case No. : 86-ERA-27

Document : Order Approving Settlement

A copy of the above-referenced document was sent to the
following persons on SEP 17 1987.

Katherine Graham

CERTIFIED MAIL

Blaine P. Thompson
4910 W. Diana
Glendale, AZ 85302

Steven Kohn, Esq.
Michael Kohn, Esq.
Gov't Accountability Project
1555 Connecticut Avenue, N.W.
Washington, D.C. 20036

Arizona Public Service Co.
Arizona Nuclear Power Project
411 North Central
Phoenix, AZ 85004

Ed VanBrunt
Executive Vice President
Arizona Nuclear Power Project
11226 N. 23rd Ave.
Phoenix, AZ 85029

Myron Scott, Secretary
Intervention Coordinator
Coalition for Responsible
Energy Education
315 W. Riviera Dr.
Tempe, AZ 85282

William R. Hayden, Esq.
Rebecca Winterscheidt, Esq.
Snell & Wilmer
3100 Valley Bank Center
Phoenix, AZ 85073-3100

Hon. Alexander Karst
U.S. Dept. of Labor
Office of Administrative Law
Judges
211 Main Street
Suite 600
San Francisco, CA 94105

REGULAR MAIL

Administrator
Wage & Hour Division
USDOL - ESA
Room S-3502, FPB
200 Constitution Ave., N.W.
Washington, D.C. 20210

Nuclear Regulatory Commission
Office of Inspection
& Enforcement
Washington, D.C. 20555

Monica Gallagher
Associate Solicitor
Office of Solicitor
USDOL - Fair Labor Standards
200 Constitution Ave., N.W.
Room N-2715
Washington, D.C. 20210

Area Director
USDOL - Wage & Hour Division
Employment Standards Admin.
3221 North 16th St., #301
Phoenix, AZ 85016

Director of Enforcement Staff
Office of Inspection and Enforcement
Nuclear Regulatory Commission
Washington, D.C. 20555

Chief Counsel
Regional Operations and
Enforcement
Nuclear Regulatory Commission
Washington, D.C. 20555

Hon. Nahum Litt
Chief Administrative Law Judge
Office of Administrative Law Judges
Suite 700
1111 20th Street, N.W.
Washington, D.C. 20036