03 MAY 1988

Docket No. 50-354

Public Service Electric & Gas Company
ATTN: Mr. Steven E. Miltenberger
Vice President and
Chief Nuclear Officer
Post Office Box 236
Hancocks Bridge, New Jersey 08038

Gentlemen:

Subject: Secretary of Labor Decision Regarding Mr. A. Francis

On April 1, 1988, the U.S. Secretary of Labor issued a Final Decision and Order which indicated that Albert Francis, a former contract employee at the Hope Creek facility was discriminated against by Bogan, Inc., his employer, for filing a series of field questionnaires and returning deficient test packages. Mr. Francis filed his complaint with the U.S. Department of Labor in September 1985, alleging that he had been demoted from a supervisory instrument technician position to a technician's position because of his unwillingness to sign off on packages that did not meet standards established by the licensee or the NRC.

Based on the Secretary of Labor's finding, it appears that this discriminatory act by one of your contractors may constitute a violation of your license and 10 CFR Part 50.7. Accordingly, we are reviewing this apparent violation for appropriate enforcement action. We plan to schedule an enforcement conference with you in the near future to discuss this apparent violation, its causes, and your corrective actions. At the conference, you should also be prepared to describe the actions taken or planned to assure that 1) this discrimination did not have a chilling effect in discouraging other licensee or contractor employees from raising perceived safety concerns, and 2) adequate oversight of contractor activities will be maintained in the future to preclude reoccurrence of such incidents.

In accordance with Section 2.790 of the NRC's "Rules of Practice," Part 2, Title 10, Code of Federal Regulations, a copy of this letter will be placed in the NRC Public Document room.

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05/02/88

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Your cooperation with us in this matter is appreciated.

Sincerely,

Original Signed By
WILLIAM T. RUSSELL
William T. Russell
Regional Administrator

Enclosure: Secretary of Labor's Final Decision and Order dated April 1, 1988

cc w/encl:
S. LaBruna, General Manager, Hope Creek Operations
W. H. Hirst, Manager, Joint Generation Projects Department, Atlantic Electric Company
L. A. Reiter, General Manager - Licensing and Reliability
Rebecca A. Green, Bureau of Radiation Protection
Public Document Room (PDR)
Local Public Document Room (LPDR)
Nuclear Safety Information Center (NSIC)
NRC Resident Inspector
State of New Jersey
Bogan, Incorporated

bcc w/encl:
Region I Docket Room (with concurrences)
Management Assistant, DRMA (w/o encl)
DRP Section Chief
Robert J. Bores, DRSS
J. Taylor, DEDO
J. Lieberman, OE
L. Chandler, OGC
F. Miraglia, NRR
G. Rivenbark, NRR
B. Clayton, EDO

RI:DRP	RI:DRP	RI:DRP	RI:DRP	RI:RC	RI:EO
*P. Swetland	* E. Wenzinger	*S. Collins	*W. Kane	*J. Gutierrez	*D. Holody
4/ /88	4/ /88	4/ /88	4/ /88	4/ /88	4/ /88

RI:DRA	RI:RA
*J. Allan	W. Russell
4/ /88	5/ /88

*See previous concurrences OFFICIAL RECORD COPY NOEL/FRAN-TWO - 0001.1.0
05/02/88

Your cooperation with us in this matter is appreciated.

Sincerely,

William T. Russell
Regional Administrator

Enclosure: Secretary of Labor's Final Decision and Order dated April 1, 1988

cc w/encl:
S. LaBruna, General Manager, Hope Creek Operations
W. H. Hirst, Manager, Joint Generation Projects Department, Atlantic Electric Company
L. A. Reiter, General Manager - Licensing and Reliability
Rebecca A. Green, Bureau of Radiation Protection
Public Document Room (PDR)
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Nuclear Safety Information Center (NSIC)
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RI:DRP	RI:DRP	RI:DRP	RI:DRP	RI:RC	RI:EO
P. Swetland	E. Wenzinger	S. Collins	W. Kane	J. Gutierrez	D. Holody
4/27/88	4/27/88	4/28/88	4/28/88	4/28/88	4/30/88

RI:DRA	RI:RA
J. Allan	W. Russell
4/29/88	4/ /88

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04/27/88

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DJH 4/18/88

DATE: April 1, 1988
CASE NO. 86-ERA-8

ALBERT FRANCIS,

CLAIMANT,

v.

BOGAN, INC.,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

The Recommended Decision and Order (D. and O.) of Administrative Law Judge (ALJ) Paul H. Teitler, dated March 21, 1986, in this case arising under section 210 of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1982), is before me pursuant to 29 C.F.R. § 24.6(b) (1987). The ALJ held that Claimant, Albert Francis, was engaged in a protected activity under the ERA because he was "about to go to the NRC. . . ." D. and O. at 13. The ALJ held further that Respondent, Bogan, Inc., discriminated against Claimant when it demoted him from his supervisory position to a technican's position. Id. at 14. The ALJ found the stated reason given by Respondent for demoting Claimant to be a pretext.

Claimant was a supervisory instrument technician for Respondent working on the calibration of instruments at the Hope Creek Nuclear Generating Station in Salem, New Jersey. At the time he was demoted, Claimant was the supervisor of a crew of technicians on the night shift. Claimant would be assigned test packages by the night shift testing coordinator, David Davis. The test packages were supposed to

contain all the information needed to calibrate the instruments to which the package applied. The ALJ's Recommended Decision and Order describes the problems Claimant found in many of the test packages and the actions he took to rectify those problems. D. and O. at 4-5. The ALJ also fully discussed several "field questionnaires" filed by Claimant raising questions about the manner in which instruments and equipment had been installed. D. and O. at 6-9. The record in this case has been thoroughly reviewed and, with the modifications discussed below, I agree with the ALJ's findings and recommendations. (A copy of the ALJ's well documented Recommended Decision and Order is appended to this Decision.)

Respondent excepted to the ALJ's decision on the grounds that Claimant did not engage in any protected activity, that there was no evidence of a causal connection between a protected activity (if there was one) and the decision to demote Claimant, and that Claimant was demoted for legitimate business reasons. Claimant excepted to the limited remedy ordered by the ALJ, two weeks backpay, arguing that he should be granted reinstatement and backpay with interest to the date of reinstatement. Claimant also seeks attorney's fees and costs and correction of his employment records.

As a general matter, I agree that section 210(a)(1) of the ERA explicitly protects an employee who is "about" to go to the Nuclear Regulatory Commission. 42 U.S.C. § 5851(a)(1). I do not think this record supports the ALJ's finding that the management officials who made the decision to demote Claimant knew that he was about to go to the NRC resident inspectors before they demoted him. It is not

necessary to decide whether such knowledge is required to establish a violation of the ERA, however, since the ALJ's decision that the Claimant engaged in protected activity is correct for a different reason. I have consistently held that reporting safety and quality problems internally to one's employer is a protected activity under the ERA. See Smith v. Norco Technical Services & Gulf States Utilities Co., 85-ERA-17, Secretary's decision issued October 2, 1987; Nunn v. Duke Power Co., Case No. 84-ERA-27, Secretary's decision issued July 30, 1987; Richter v. Baldwin Associates, 84-ERA-9, 10, 11 & 12, Secretary's decision issued March 12, 1986; Wells v. Kansas Gas and Electric Co., 83-ERA-12, Secretary's decision issued June 14, 1984, aff'd, Kansas Gas Electric v. Brock, 780 F.2d 1505, 1510 (10th Cir. 1985), cert. denied, 106 S. Ct. 3511 (1986); Mackowiak v. University Nuclear Systems, Inc., 82-ERA-8, Secretary's decision issued April 29, 1983, rem. on other grounds, 735 F.2d 1159 (9th Cir. 1984) (aff'd as to scope of protected activity, 735 F.2d at 1163). The reasoning of those cases, see, e.g., Nunn, slip op. at 10-13, is equally applicable here and compels the conclusion that Claimant engaged in protected activity under the ERA, of which Bogan was fully aware.

On this record, it appears, and I so find, that Respondent was aware of the field questionnaires filed by Claimant, and in particular his insistence, the day before he was demoted, that some action be taken on a field questionnaire he had written in January 1985. See D. and O. at 7-9. Respondent was also aware that Claimant had returned a number of test packages because they were deficient. T. at 241. This

delayed completion of testing the instruments. T. at 136. David Davis, Claimant's immediate supervisor on the night shift, confirmed that there were many deficiencies in the test packages. T. at 135. One of the reasons given by Respondent for demoting Claimant was his holding of test packages. T. at 204. Thus, the record shows that Respondent had knowledge of protected activity (filing a series of field questionnaires and returning deficient test packages) by Mr. Francis when it demoted him.

Furthermore, I agree with the ALJ's conclusion that the reasons given by Respondent for demoting Claimant were pretextual. The opinions stated in the testimony of Respondent's two supervisors, Douglas Campbell and Robert Class, each of whom claimed to have made the decision to demote Claimant, that his productivity was low, were directly contradicted by David Davis. It is significant that Mr. Davis was the test package coordinator on night shift who worked with Claimant on a day-to-day basis, T. at 124, while the higher level supervisors Campbell and Class formed their impressions of Claimant's work from discussions with other of Respondent's employees and from computer summaries of test packages completed. T. at 224, 228. The summaries were not introduced in evidence. Mr. Davis specifically denied ever discussing Claimant's productivity with Respondent's managers. T. at 133. Mr. Davis thought Claimant's work was competent, of good quality and up to productivity standards. T. at 132-133.

Mr. Campbell did not ask Mr. Davis his opinion of Claimant's productivity. Rather Mr. Campbell based his opinion of Claimant's

productivity on Mr. Campbell's own experience in the industry, and did not take into consideration the number of workers in Claimant's crew or the complexity of instruments being worked on. T. at 218-219. Claimant returned many test packages because they were deficient, which lowered his productivity of completed packages. T. at 26, 47. Mr. Davis confirmed that many test packages were in poor shape, containing irrelevant or erroneous data and incorrect procedures. Some packages applied to instruments which had not yet been installed. T. at 135-136. Based on these facts, as well as others discussed by the ALJ, D. and O. at 14-15, I agree with the ALJ's weighing of the evidence that Claimant proved that Respondent's articulated reason for demoting him was a pretext. 1/ Therefore, I adopt the ALJ's conclusion that Respondent discriminated against Claimant when it demoted him.

The ALJ recommended limiting the remedy for Claimant to two weeks backpay because he found that in August, 1985, Claimant was considering making a request to be relieved of his supervisory duties. The ALJ apparently felt, therefore, that awarding more than two weeks backpay would be a windfall and that Mr. Francis was not entitled to reinstatement. D. and O. at 17. It is a long accepted rule of

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1/ As explained in Dartey v. Zack Co., 82-ERA-2, Secretary's decision issued April 25, 1983, the dual motive analysis set out in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), is applicable only where an employer's adverse action was motivated by two reasons, one legitimate and one prohibited. Here the ALJ determined that Bogan's explanation for Francis' demotion was pretextual. Thus, Francis was entitled to prevail and no further discussion of dual motives was appropriate. The ALJ's apparent reliance on Mt. Healthy, however, was harmless given the explicit finding of pretextuality.

remedies in labor law that the period of an employer's liability ends when the employee's employment would have ended anyway for reasons independent of the violation found. See Walt Disney Productions, 48 N.L.R.B. No. 892 (1944), enf'd as modified, 146 F.2d 44 (9th Cir. 1944). But the cases require some explicit act or concrete event to cut off backpay or extinguish the right of reinstatement. In Knickerbocker Plastic Co., 132 N.L.R.B. No. 1209 (1961), for example, the National Labor Relations Board (NLRB) denied reinstatement to a discharged employee who had declined an explicit offer of reinstatement by the employer. See also Ford Motor Co. v. EEOC, 458 U.S. 219, 231-232 (1982). In Bourque v. Powell Electrical Co., 617 F.2d 61, 66 (5th Cir. 1980), an employee who proved wage discrimination was entitled to backpay only until the date she resigned.

In contrast, the NLRB has "consistently . . . discounted statements, prior to a good faith offer of reinstatement, indicating unwillingness to accept reinstatement." Heinwick Motors, Inc., 166 N.L.R.B. No. 88 (1967), 1967 CCH NLRB 21,654, at 28,297. I think the reasons for this NLRB rule in discharge cases are equally applicable to the situation here. As the NLRB said in Heinwick Motors:

> We are mindful of the fact that such statements may reflect only a momentary state of mind that is subject to change: prior to an offer of reinstatement, such statements are in the nature of answers to a hypothetical question; and the discriminatee's expression 'may have been made in the heat of dissatisfaction with his treatment by Respondent.'

CERTIFICATE OF SERVICE

CASE Name: Albert Francis v. Bogan, Inc.

Case No. : 86-ERA-8

Document : Final Decision and Order

This is to certify that a copy of the above-referenced document was sent to the following persons APR 1 1988.

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