

DOWNES RACHLIN & MARTIN PLLC

ATTORNEYS AT LAW

DEACON JOHN HOLBROOK HOUSE • 80 LINDEN STREET • PO BOX 9 • BRATTLEBORO • VERMONT 05302 0009
+1 802 258 3070 • FAX +1 802 258 4875

November 21, 2000

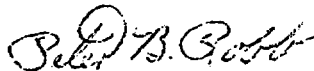
Austin Burbank, Clerk
United States District Court
P.O. Box 988
Brattleboro, VT 05302-0988

Re: Vermont Yankee Nuclear Power Corporation and Dr. George Idelkope v. United States
Equal Employment Opportunity Commission and William Sorrell, Attorney General of
the State of Vermont, Civil Action No. 1:00-cv-254

Dear Austin:

Enclosed for filing please find Plaintiffs' Supplemental Response and Certificate of Service in the above referenced matter.

Very truly yours,



Peter B. Robb

/jsb

Enclosures

cc: Katherine A. Hayes, Esq.
Paul J. Van De Graaf, Esq.

BRT/28505.2

template
06C002

ELTDS 06C01

DOWNNS RACHLIN & MARTIN PLLC

Austin Burbank, Clerk
November 21, 2000
Page 2

bcc: Charles E. Mullens, Esq.
Heather E. Ross, Esq.
Ms. Sandra Ward

BRT/28505.2

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

VERMONT YANKEE NUCLEAR
POWER CORPORATION and
DR. GEORGE IDELKOPE,
Plaintiffs,

v.

UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION and
WILLIAM SORRELL, ATTORNEY GENERAL
OF THE STATE OF VERMONT,
Defendants.

Docket No. 1:00cv254

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November 2000, Plaintiffs Vermont Yankee Nuclear Power Corporation and Dr. George Idelkope, by and through their attorneys, Downs Rachlin & Martin, PLLC, served their Supplemental Response by first class mail, postage prepaid, to Katherine A. Hayes, Esq., Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, Vermont 05602 and Paul J. Van De Graaf, Esq., Assistant United States Attorney, Chief, Civil Division, P.O. Box 570, Burlington, Vermont 05402-0570.

Brattleboro, Vermont
November 21, 2000

DOWNS RACHLIN & MARTIN, PLLC

By

Peter B. Robb

Peter B. Robb

Fed. ID # 000362657

80 Linden Street

P.O. Box 9

Brattleboro, VT 05302-0009

ATTORNEYS FOR PLAINTIFFS
VERMONT YANKEE NUCLEAR
POWER CORPORATION and
DR. GEORGE IDELKOPE

DOWNS RACHLIN BRT/29235.1

& MARTIN PLLC

BRATTLEBORO VT
BURLINGTON VT
LITTLETON NH
ST. JOHNSBURY VT

discussed below, Plaintiffs did not agree to accept the contents of the Letter. Of course, Plaintiffs recognize that the NRC can present its opinions without prior consultation with or approval by Plaintiffs.

The first issue addressed by the Letter deals with concerns expressed in the Complaint for Declaratory Judgment (the "Complaint") that Plaintiffs would violate NRC regulations, 10 C.F.R. § 26.29, by complying with the CIDs. See Complaint, ¶ 10 and 29. The Letter advises that Plaintiff Dr. George Idelkope will not violate 10 C.F.R. § 26.29 by complying with the CID issued to him because the affected individual signed a Consent to Disclosure to the Vermont Attorney General. The Letter further states that the NRC would not consider VY to be in violation of 10 C.F.R. § 26.29 for complying with the CID as long as any information that might be used to identify a particular individual, such as name, address and job title, is redacted. NRC Attorney Charles E. Mullins, Esq., who is mentioned in the Letter, has indicated that the Letter represents the NRC's position on those issues.

Plaintiffs were concerned about violating 10 C.F.R. § 26.29 because the language of that regulation does not permit release of the information requested by the CID, absent a court order. Whether the EEOC or the Vermont Attorney General can get such a court order is, of course, the primary issue in this lawsuit. Even though the explicit language of 10 C.F.R. § 26.29 does not appear to authorize, absent a court order, release of information to the EEOC or the Vermont Attorney General, Plaintiffs will accept the NRC's written position that the NRC will not consider VY to be in violation of 10 C.F.R. § 26.29 by releasing information to the EEOC or the Vermont Attorney General as long as the affected individuals have signed a valid Consent to Disclosure or any information that might be used to identify a particular individual is redacted. The NRC's position on 10 C.F.R. § 26.29 stands in stark contrast to the Vermont Attorney

General's prior interpretation of the NRC regulations. Contrary to the bold assertion that "the AG's investigation, which is presently in its preliminary stages, in no way exposes VY to liability for violating the NRC regulations,"¹ it is now clear that had VY released information with only the names redacted, the NRC would have considered VY to have violated 10 C.F.R. § 26.29. Thus, the Letter underscores the principle that the NRC, rather than the Vermont Attorney General, can interpret NRC fitness for duty regulations.

The second issue discussed in the Letter is more pertinent to the primary question in this proceeding.² The Letter makes it clear that VY's Medical Review Officer ("MRO") has the discretion "to find that a person who is taking a drug that is not listed as a prohibited drug, such as methadone, is not fit to perform their assigned duties." The NRC's statement directly contradicts the Vermont Attorney General's contention in his Motion to Dismiss that the MRO is not responsible for determining fitness for duty beyond the interpretation of tests for drugs specifically listed by the NRC. In neither instance was the Vermont Attorney General's interpretation of the NRC regulations supported by the NRC's opinion Letter.

The Letter also emphasizes the NRC's role in reviewing an MRO's fitness for duty decisions. The Letter notes that the author, and presumably anyone else at the NRC, has not reviewed the MRO's fitness for duty justification. The Letter warns that "[i]f the Attorney General attempts to order Vermont Yankee to reinstate this individual to a position that requires unescorted access to the protected area, the NRC will examine that request closely." Indeed, in the Letter, the NRC expressly refuses to concede that the Vermont Attorney General has the power to compel reinstatement to a position that requires an unescorted access security clearance, like the mechanic position held by the Employee in this case. As expressed in

¹ Defendant Vermont Attorney General William Sorrell's Motion to Dismiss at 8.

² The third issue responds to an opinion that the Complaint "implies" VY was required by NRC regulations to terminate the Employee. Because VY has not made such a contention, the issue is irrelevant.

Plaintiffs' previous submission, the Employee was not a "qualified" individual for purposes of the American With Disabilities Act or the Vermont Fair Employment Practices Act because he did not have an unescorted access security clearance needed for his mechanic position, and only the NRC can review a denial of an unescorted access security clearance based on the MRO's determination that the Employee was not fit for duty. Consequently, the Letter fully supports that the CIDs requested by the Vermont Attorney General, acting for himself and the EEOC, improperly seek to compel Plaintiffs to divulge information about fitness for duty determination that cannot be reversed by either EEOC or the Vermont Attorney General.

Brattleboro, Vermont
November 21, 2000

Respectfully submitted
DOWNS RACHLIN & MARTIN, PLLC

By Peter B. Robb
Peter B. Robb
Fed. ID # 000362657
Timothy E. Copeland, Jr.
Fed. ID #000629016
80 Linden Street
P.O. Box 9
Brattleboro, VT 05302-0009

ATTORNEYS FOR PLAINTIFFS
VERMONT YANKEE NUCLEAR
POWER CORPORATION and
DR. GEORGE IDELKOPE

BRT/29179.1

DOWNS RACHLIN
& MARTIN PLLC

BRATTLEBORO VT
BURLINGTON VT
LITTLETON NH
CHAMPAIGN VT



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

October 27, 2000

Mr. John Moriarty
Director of Security
Vermont Yankee Nuclear Power Corporation
185 Old Ferry Road
P.O. Box 7002
Brattleboro, Vermont 05302

SUBJECT: VERMONT YANKEE NUCLEAR POWER CORPORATION AND DR. GEORGE IDELKOPE v. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND WILLIAM SORRELL, ATTORNEY GENERAL OF THE STATE OF VERMONT, Case No. 00cv254 (D. Vt.)

This letter addresses various issues raised in the above-captioned litigation and results from an agreement between Mr. Peter Robb, Counsel for Vermont Yankee Nuclear Corporation, Mr. Paul Van de Graaf, Chief of the Civil Division for the Office of the United States Attorney for the District of Vermont, and Mr. Charles Mullins, a Senior Attorney in the Office of the General Counsel for the U.S. Nuclear Regulatory Commission (NRC).

I am the Branch Chief of the Operator Licensing, Human Performance, and Plant Support Branch (IOLB), which is part of the Division of Inspection Program Management, which in turn is part of the Office of Nuclear Reactor Regulation at the NRC. The immediate responsibility for enforcement of 10 C.F.R. Part 26 rests with the Reactor Safeguards Section, which is a part of the plant support function of the IOLB. Thus, as Branch Chief, my duties include the supervision and coordination of the overall inspection and enforcement program insofar as it relates to potential violations of the NRC's Fitness-for-Duty regulations found in 10 C.F.R. Part 26.

The U.S. Department of Justice and the Equal Employment Opportunity Commission (EEOC) have asked me to address three matters at issue in this case: (1) whether Vermont Yankee can comply with the Civil Investigative Demands served by the Attorney General of Vermont without violating NRC regulations; (2) whether a Medical Review Officer (MRO) has the authority to proscribe additional medications not prohibited by the NRC's regulations; and (3) whether an NRC licensee is required to terminate the employment of an individual who is determined to be "unfit" for duty. I have reviewed the Complaint filed in this case and other documents as further described below.

The first issue I will address is whether Vermont Yankee and the MRO, Dr. George Idelkope, can comply with the Civil Investigative Demands filed by the Vermont Attorney General without violating the applicable NRC regulations. I have been advised by NRC counsel assigned to this matter and have reviewed the Civil Investigative Demands filed by the Attorney General of the State of Vermont, which are the subject of Paragraphs 24 through 29, inclusive, of the Complaint, and the "Authorization to Investigate, Consent to Disclosure," submitted by the individual who has filed the underlying charge with the EEOC.