

B/B

# **U.S. Nuclear Regulatory Commission**

**Predecisional Enforcement Conference  
with the  
University of Missouri  
July 23, 2001**

# **AGENDA**

**Opening Remarks**

**Chancellor R. Wallace**

**Issue Discussion**

**B. Deaton/A. Ketring**

**Legal Perspectives**

**T. Poindexter**

**Programmatic Improvements**

**R. Butler**

**Closing Remarks**

**Chancellor R. Wallace**

July 23, 2001

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10 CFR 2.790~~

# Opening Remarks

- **MURR must continuously strive to improve its working environment.**
  - The academic community prides itself on the ability to speak freely and openly about any issue.
  - Personnel must feel free to raise safety issues.
- **MURR has a right to administer its research in the direction it chooses.**
  - Acknowledge that administration of regulated activities cannot ignore ability to freely raise safety issues.
  - Researchers do not have the authority to choose research direction for the reactor.
  - Misuse of regulatory process to support personal viewpoints should be discouraged.
- **The NRC should not facilitate MURR being held hostage whenever its direction differs from the desires of its researchers.**
  - Regulation impacting administration of programs can chill university management decisions.
  - Tough management should not be confused with a chilled environment.

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# Apparent Violation

On July 7, 1999, a [redacted] issued a letter of "Disciplinary Action - Second Oral Warning" to the [redacted]. The letter indicated that the warning was issued because the [redacted] had called DOE and discussed the level of commercial activity at MURR without authorization of the [redacted] MURR or the University. The warning letter stated that the conversation with the government official clearly exceeded the authority of the [redacted]. The warning letter stated that the [redacted] was "not authorized to discuss MURR management, priorities, etc. with any governmental (state or federal) officials"...OI determined that the [redacted] engaged in a protected activity when he interpreted the DOE official's statements as a DOE concern and forwarded this concern to the Provost in the letter of [redacted]. that the [redacted] was aware of the protected activity because he had received a copy of the [redacted] letter; that the warning of [redacted] constituted an adverse action against the [redacted] and that it appears that the adverse action was in response to the protected activity. (Emphasis added).

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# The Warning

".. [ ] shared with me a copy of your [ ] letter to [ ] [copy attached].

In this letter you report calling your [ ] these calls are perfectly appropriate if the subject matter is your individual research grants. [Also from your MURR indoctrination you are well aware that you can contact government officials with respect to safety concerns or violations of NRC regulations.]

*However, in this letter you report calling [ ] of the DOE and discussing 'the level of commercial activity at MURR.' You were not authorized to do so by me, by MURR, or by MU. You have no specific knowledge of 'the level of commercial activity at MURR.'*

*Such a discussion with a government official clearly exceeds your authority, and borders on insubordination. Do not do it again. Also, you are not authorized discuss MURR management, priorities, etc. with any governmental [state or federal] officials. Such discussions are the province of MURR and MU officials, who work through and with the appropriate University Offices of state and federal relations....(Emphasis added)...."*

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# Summary of MURR Position

- OI Report Factual Summary takes MU statements out of context.
- Based on past actions by [ ] strong words were appropriate.
  - [ ] was not allowed to speak on behalf of MU, notwithstanding the audience.
    - [ ] history of exceeding authority was valid basis for management concern with the DOE communication.
    - MU was reasonably concerned with the accuracy of [ ] communication and his lack of accurate knowledge on the topic.
    - Misstatements by [ ] could have exposed the university to false statement violations.

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Ex. 7C

# Summary of MURR Position

- Based on past actions by [redacted], strong words were appropriate (cont'd)
  - [redacted] inappropriately used the regulatory process to retaliate for not being allowed to pursue desired research.
    - “level of commercial activity” statement as leverage to justify his research project.
    - MU emphasized [redacted] right to raise safety concerns.
  - Implication of the “warning” was that [redacted] was not allowed to speak as an official of MU as he had tried to do in the past.
- Presentation will demonstrate that there was no protected activity and no adverse action that constitutes a violation of 10 CFR 50.7.

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# Placing the NRC Issue in Context: Timeline of Events

- 1990 [ ] determines that focus of reactor activities should be on materials sciences.
- 4/93 Life sciences researchers file DOL suit against materials sciences [ ]
- 9/94 NRC NOV involving retaliation against life sciences researchers for raising safety concerns.
- 5/94 DOL Recommended Decision and Order: retaliation for raising safety concerns (brought by life sciences researchers against materials sciences-focused)
- 1/96 DOL Secretary of Labor Final Order
- 1996 Reactor Advisory Committee determines that focus of MURR should be on life sciences research and education (focus away from materials sciences).
- 1997 [ ] hired; focus promptly shifts to life sciences and away from materials sciences.

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# Placing the NRC Issue in Context: Timeline of Events

- 4/21/98 [ ] note stating, "Quotes were provided to GA, (for the Morocco and Thailand projects) in good faith, after comprehensive discussion with [ ]"
- 5/20/98 E-mail, Paragraph 2 (based on a telephone discussion with General Atomics). states, "GA bid their contract to Thailand and Morocco based on the numbers [ ] had provided months ago, so I could sense [ ] [of GA] getting nervous that he only had verbal commitment from [ ] to provide the instruments." (Emphasis added.)
- 6/10/98 MURR attempts to correct the commitments that [ ] inappropriately made while claiming to have the authority to speak on behalf of MURR.
- 6/30/98 TRIGATECH states, "We received what we believe were firm offers provided by [ ] ...It is our understanding that the details of the offers were discussed with, and had the approval of, the [ ]"
- 8/5/98 Urgent letter from Trigatech regarding [ ] agreement to provide services.

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# Placing the NRC Issue in Context:

## Timeline of Events

- 8/8/98 [ ] reemphasizes to Trigatech that there is no contract with MURR, contrary to what [ ] had indicated (and had no authority to indicate).
- 8/17/98 Corroborates [ ] testimony regarding the basis for his concern that [ ] was again acting out-of-scope.
- 11/25/98 [ ] grievance against [ ] alleging violation of academic freedom; demand control of and credit for creative activities; discrimination re evaluation of job performance; conflict of interest rules applied in discriminatory fashion, deprivation of appropriate financial rewards for creative efforts; damage to reputation; libel.
- 11/30/98 [ ] grievance against [ ] alleging prevention of ability to obtain funding for research; conflict of interest regulations applied in arbitrary and discriminatory fashion, injury to professional and personal reputation.
- 2/2/99 Grievance panel begins hearing [ ] [ ] grievances.
- 3/9/99 [ ] letter to [ ] asking for him to arbitrate request for research funding.
- 4/13/99 [ ] rejects [ ] proposal.

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# Placing the NRC Issue in Context: Timeline of Events

5/4/99 First Oral Warning focusing on hostile/aggressive behavior towards fellow employees.

[ ] Letter to [ ] requesting support for research projects.

8/12/99 [ ] supplemental grievance against [ ] alleging retaliation and discrimination.

8/16/99 [ ] supplemental grievance against [ ] alleging retaliation and discrimination.

8/27/99 [ ] grievance hearing.

9/7/99 [ ] submit additional grievance materials.

10/28/99 [ ] submits additional grievance materials.

10/15-  
1/15/99 Series of communications between [ ] regarding [ ] proposal to establish a private business entity involving fabrication of neutron beam instrumentation.

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# Placing the NRC Issue in Context: Timeline of Events

- 1/28/00 Grievance panel concludes that grievances stemmed primarily from a difference of opinion between [ ] and grievants concerning role of MURR scientists and fundamental research priorities for MURR.
- 2/28/00 Chancellor delivers decision to [ ]
- 5/15/00 NRC initiates investigation to determine if a [ ] at MURR was subjected to discrimination by management for raising safety concerns.
- 9/11/00 Missouri Ethics Commission notifies [ ] that two complaints have been filed alleging violations of Missouri conflict of interest statutes.
- 10/24/00 OI concludes investigation began on 5/15/00 and concludes that employee discrimination did not occur, but potential chilling atmosphere substantiated.
- 3/5/01 NRC letter to MURR requesting assessment of SCWE and corrective action effectiveness.
- 6/11/01 NRC notification to MURR of apparent violation.
- 7/01 [ ] files petition for damages against [ ]

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# Legal Perspectives

- MURR has a right to establish who, when and how it will carry on business with the state and federal government.
  - Exception would be “blowing the whistle” on safety concerns.
    - Otherwise, [REDACTED] may not usurp management function.
  - MURR allowed to act consistent with its rights (10 CFR 50.7(d)).

*“Actions taken by an employer, or others, which adversely affect an employee may be predicated upon non-discriminatory grounds...An employee’s engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by non-prohibited considerations.” Emphasis added.*

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# Legal Perspectives

- **NRC enforcement action would be inconsistent with case precedent and comparable regulatory agency actions.**
  - 50.7 provisions on discrimination were designed to “closely track the statutory language” of Section 211 [47 Fed. Reg. 30,452, 30,453 (1982)].
    - Federal conclusions are applicable to NRC actions.
- **NRC review of warning statement must be viewed in context with the rest of the document.**
  - *Bryson v. Chicago State Univ.*, 96 F.3d 912, 916 (7th Cir. 1996)
- **[REDACTED] statements, as demonstrated by their context, involved an ongoing dispute with management practices, not nuclear safety.** EX. 7C
  - Disagreement with how much money the reactor makes coupled with disagreement with researchers paying for fees.
  - Disagreement with the university non-support of requested efforts.

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# Legal Perspectives

- Warning by [ ] concerned [ ] uninformed and out-of-scope contact with DOE, not his right to send a letter to the [ ] or his right to discuss issues with DOE regarding safety concerns.
  - Counseling letter clearly notes that only certain contacts “with a governmental official” [not including matters dealing with safety concerns] were beyond [ ] authority.
  - Valid concern that [ ] lacked knowledge on the subject that he was addressing with DOE.
  - MURR/[ ] had a reasonable basis for believing that [ ] was exceeding his authority.

Portions withheld - Ex 7C

# Legal Perspectives

- **An employee acting out of the scope of his authority constitutes a legitimate basis for adverse action against that employee.**
  - MU concern that [ ] was falsely portraying himself as being authorized to speak on behalf of University is a valid basis for management action.
    - Pattern of *ultra vires* activity preceded reprimand.
  - Concern that [ ] was deliberately providing inaccurate, misleading, or incomplete information to the regulator is a valid basis for management action.
  - *Holtzclaw v. USEPA*, 95-CAA-7, February 13, 1997
    - Failure to renew contract due to unauthorized activities.
    - EPA employee actions misled others regarding level of authority.
    - DOL ruled that out of scope activities constitute legitimate basis for adverse action against an employee.

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# Legal Perspectives

- The issue raised by [ ] did not implicate a nuclear safety issue and as such, his conduct was not a protected activity.
  - Act must implicate safety “definitively and specifically.”
    - Incidental inquiries do not count.
    - *Makam v. PSE&G*, Case No. 98-ERA-22 (Jan. 30, 2001).
  - Consider 10 CFR 708(a)(2): disclosure protected where it relates to a “substantial and specific danger to . . . safety.”
  - Even if [ ] issue was victorious, no relevance or enhancement to nuclear safety.
- NRC rationale, used in some past cases, that reprimands are actionable because of their “potential” to have job consequences, is a theory generally rejected under federal law.
  - NRC should adhere to other regulatory interpretations (e.g., DOL, DOE) of what is an actionable adverse action.

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# Legal Perspectives

- **Dispute with management practices is not a legitimate protected activity for NRC regulation unless there is an adverse impact on safety.**
  - Generalized concern about management's exercise of its prerogatives is not a protected activity.
  - Even if concerns about management are considered protected activity, the threshold should be that the concern involve "gross mismanagement."
    - See 10 CFR 708.5(a)(3).

*"If you are an employee of a contractor, you may file a complaint against your employer alleging that you have been subject to retaliation for:...revealing information that you reasonably believe reveals ...Fraud, gross mismanagement, gross waste of funds, or abuse of authority...." Emphasis added.*

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# Legal Perspectives

- **“Not everything that makes an employee unhappy is actionable adverse action. Otherwise, minor and even trivial employment actions that ‘an employee did not like would form the basis of a discrimination suit.’”**
  - *Smart v. Ball State University*, 89 F. 3d 437, 441
- **\_\_\_\_\_ cannot impute DOE’s supposed expression of “shock and concern” regarding the level of commercial activity as being his concern or protected activity.**
  - *Clark County Sch. Dist. v. Breeden*, 522 U.S. \_\_\_\_; 121 S. Ct. 1508, 1510; (April 23, 2001).

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# Legal Perspectives

- **An oral reprimand, even if documented in the personnel file, does not constitute a tangible job consequence that supports a discrimination action.**
  - Under Section 211, only actions with “tangible job consequences” can support a “discrimination” claim.
    - *Shelton v. Oak Ridge National Labs*, 1995-CAA-19, (Mar. 30, 2001)
    - *Oest v. Illinois Dep’t of Corrections*, 2001 WL 1211 (7th Cir. 2001)
  - MURR ] salary action was *de minimus*.
- **The action by an employer must “affect [the employee’s] employment status.”**
  - *Smyth v. Johnson Controls World, Inc.*, Case No. 98-ERA-23 (June 29, 2001)
  - [ ] action did not affect his employment status.

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# Analogous Legal Perspectives

- Courts state that employee's interests in whistleblowing are balanced with the government's interests where the primary consideration is the impact of the disputed speech on the effective functioning of the public employer's enterprise.
  - *Rankin v. McPherson*, 483 U.S. 378 (1987)
- An employee's interest is not weighty when the employee is carrying out a vendetta, rather than engaging in a "good Samaritan" act of blowing the whistle.
  - *Lighton v. University of Utah*, 209 F. 3d 1213 (10th Cir. 2000)
  - *Gumbhir v. Curators of the University of Missouri*, 157 F. 3d 1141 (8th Cir. 1998)
  - See [ ] Petition for Damages against [ ]

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# **Legal-based Conclusions**

- **Section 50.7(f) only prohibits discouragement of activity that is otherwise protected; no protected activity was involved.**
- **Document, when appropriately viewed in context, makes it clear that there was no effort to discourage reporting of perceived or actual violations of nuclear regulatory safety requirements.**
- **Concluding that MURR's actions constituted a violation of 10 CFR 50.7 would be inconsistent with legal precedent -- "no violation of 10 CFR 50.7" is the appropriate conclusion.**

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# Actions to Improve SCWE

- **Clearer communications**
  - Plan of the Day meetings
    - Better understanding of basis for management decisions.
  - Open office hours
  - MURR Lunch Program
  - Mailbox

# Closing Remarks

- Enforcement is not appropriate.
- NRC should resist being used in personal vendetta by [ ]
- Organizational changes should improve the MURR "atmosphere."
- Efforts underway to improve communication with workforce.
- Focus on improving reactor performance and reactor management (i.e., COO, Reactor Manager) remains on track.

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