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NUCLEAR REGULATORY COMMISSION
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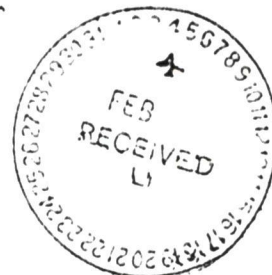
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The Honorable William E. Brock, III
Secretary of Labor
U. S. Department of Labor
Washington, D.C. 20210

Re: James E. Wells, Jr. v. Kansas Gas & Electric Company
Case No. 85-ERA-0022



Dear Mr. Secretary:

I am writing to you concerning a recommended decision which is before you for review. I have no position on the merits of the controversy but wish to address one aspect of the Administrative Law Judge's recommended remedy.

In a Recommended Decision and Order (Order) in the above referenced case dated December 5, 1986, Administrative Law Judge George A. Fath found that Kansas Gas & Electric Company (KG&E) discriminated against Mr. Wells in violation of Section 210 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851. The ALJ recommended that you issue an order requiring, inter alia, that KG&E "grant unescorted access to Wells at the [Wolf Creek] nuclear plant." Order at 14. The Nuclear Regulatory Commission wishes to inform you of its concern regarding that remedy.

The Wolf Creek Nuclear Power Plant, like all operating nuclear power plants, is subject to NRC security and safeguards requirements. See 10 C.F.R. §§ 50.34(c), (d) and 10 C.F.R. Part 73. KG&E is required to have an NRC-approved physical security plan in accordance with 10 C.F.R. § 73.55 to provide high assurance to protect against the threat of radiological sabotage. This includes screening programs to assure that persons granted unescorted access to the facility are reliable and trustworthy. The failure to comply with the terms of the Wolf Creek security plan may subject KG&E to NRC enforcement action.

We fully recognize the Department's authority and responsibility under the Energy Reorganization Act to determine whether there has been discrimination against individuals in violation of Section 210 of the Act and to order appropriate relief as provided in Section 210. It is our view, however, that in the circumstances of this case, an order that would require a licensee such as KG&E to grant unescorted access to an individual as a remedy for discrimination is inappropriate in view of the NRC's regulatory responsibilities under the Atomic Energy Act, which include approval, inspection and enforcement of access programs. Such an order would require KG&E to grant unescorted access to an individual who has not been shown to satisfy the criteria for the granting of such access.

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In this case, since Mr. Wells never had unescorted access status at Wolf Creek, ordering unescorted access is not a restoration or reinstatement of a prior status. See Deford v. Secretary of Labor, 700 F.2d 281, 289 (6th Cir. 1983). Consequently, whether or not there has been discrimination against Mr. Wells by KG&E, it would be inappropriate, in our view, for the Department of Labor to order KG&E to grant Mr. Wells unescorted access. Assuming that KG&E did discriminate against Mr. Wells, we do not know whether Mr. Wells is qualified for unescorted access under the licensee's security plan. At this time, however, in the absence of a properly conducted evaluation in accordance with the Wolf Creek security plan supporting Mr. Well's qualification for unescorted access, the granting of unescorted access for Mr. Wells would be in violation of NRC requirements.

We respectfully request that if the Department determines that KG&E discriminated against Mr. Wells in denying him unescorted access and wishes to order relief which specifically addresses that issue, then it would be appropriate, inter alia, to order KG&E to reinstate Mr. Wells and conduct a reevaluation of his qualification for unescorted access in accordance with the security plan. The NRC, as part of its inspection program, will continue to monitor KG&E's compliance with the access authorization provisions of its security plan and also will monitor the application of those procedures by KG&E to Mr. Wells to assure their consistent application.

Commissioner Asselstine does not agree with this response and will provide his views in a separate letter.

Sincerely,

Lando W. Zech Jr.

cc: Administrative Law Judge, DOL
George A. Fath

Glen L. Koester, Vice President-Nuclear
Kansas Gas and Electric Company

James E. Wells, Jr.

Michael C. Helbert, Esq.

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