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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of

GEORGIA POWER COMPANY,
et al.

(Vogtle Electric
Generating Plant,
Units 1 and 2)

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Docket Nos. 50-424-OLA-3
50-425-OLA-3

Re: License Amendment
(Transfer to Southern
Nuclear)

GEORGIA POWER COMPANY'S APPLICATION FOR
A STAY OF THE LICENSING BOARD'S FEBRUARY 18, 1993
MEMORANDUM AND ORDER ADMITTING A PARTY

John Lamberski
Counsel for
Georgia Power Company

March 4, 1993

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I. Introduction.

By memorandum and order dated February 18, 1993, the Atomic Safety and Licensing Board (the "Board") ordered, among other things, that (1) Petitioner Allen L. Mosbaugh be admitted as a party to this case, (2) one reconstituted contention be admitted, and (3) discovery commence immediately (the "Board's Order").

Georgia Power Company ("GPC") hereby applies for a stay of the effectiveness of the Board's Order, pursuant to 10 C.F.R. § 2.788, pending a decision by the Commission on GPC's appeal of the Board's Order pursuant to 10 C.F.R. § 2.714a.

Counsel for the NRC Staff has stated that, as of March 1, 1993, the NRC Staff was also planning to file an application to stay the Board's Order and that the NRC Staff did not object to Georgia Power's stay request.^{1/}

II. Background.^{2/}

The Board's Order admitted the following contention:

The license to operate the Vogtle Electric Generating Plant, Units 1 and 2, should not be transferred to Southern Nuclear Operating Company, Inc., because it lacks the requisite character, competence and integrity, as well as the necessary candor, truthfulness and willingness to abide by regulatory requirements.

^{1/} During the January 12, 1993 prehearing conference in this matter, Michael Kohn, counsel for Mr. Mosbaugh, indicated that he did not oppose a Staff-requested delay of as much as six months in these proceedings. Tr. at 101. However, when contacted by counsel for GPC, Mr. Kohn stated that he is opposed to GPC's current stay request.

^{2/} For a more detailed discussion of the background of this case, refer to GPC's Notice of Appeal of the Licensing Board's February 18, 1993 Order, dated March 4, 1993.

At least some aspects of the petitioner's "factual basis" for this contention are currently the subject of a DOJ investigation. See "NRC Staff Response to Allen L. Mosbaugh's Amendments to Petition to Intervene and Request for Hearing and Contingent Motion to Defer the Staff's Reply to Contentions and Rulings of Contentions," dated December 31, 1992, at pp. 6-7. While GPC strenuously denies that any of its employees have engaged in wrongdoing, if discovery is allowed to proceed in this proceeding, in all likelihood, GPC and certain of its employees will be subject to discovery requests on the same allegations being investigated by DOJ.

The Board's Order seeks to resolve this dilemma by requiring that: (1) "[n]egotiations among the parties shall commence immediately, concerning: (a) a protective order and an insulating wall that might make the discovery of investigative documents possible at this time ...," and (2) "[o]n March 8, 1993, the Staff shall file a brief showing cause why discovery of prosecution-related documents should not commence immediately." GPC appreciates the Board's interest in trying to move the proceeding ahead expeditiously; however, even the Board's Order recognizes that its interest in promptly and efficiently adjudicating this case is in conflict with the interest to protect the confidentiality of documents under the DOJ investigation. Board's Order at 26. The Board concluded that these conflicting interests could be harmonized "if the parties could reach an agreement on how the relevant informa-

tion can be shared pursuant to a protective order that contains a carefully constructed provision that would keep all potential defendants, and all potential counsel for those defendants, ignorant of the contents of the investigation." It is not clear that this will adequately address the problem of protecting the investigative materials. In any event, the Board does not try to address the problem of the rights of individuals who are or may be subjects of the investigation and of discovery in this proceeding, concurrently.

III. Grounds for GPC's Stay Request.

There are four factors which must be considered in determining whether to grant or deny an application for a stay:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

10 C.F.R. § 2.788(e).^{3/}

It has been held that the most crucial of the four factors of Section 2.788 is the second factor: whether the movant will incur irreparable injury absent a stay. See PSNH

^{3/} These factors are the same as those that the courts apply in granting or denying a stay pending appeal. Public Service Company of New Hampshire ("PSNH") (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 257 (1990).

at 258 citing Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 N.R.C. 795, 797 (1981). If the Board's Order is not stayed, GPC employees could be subject to depositions and interrogatories on precisely the same issues that are being investigated by the DOJ. This situation has the potential for undermining the Fifth Amendment privilege rights of GPC employees, expanding the rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), exposing the basis of GPC's and its employees' defenses to any criminal prosecution in advance of a trial, or otherwise prejudicing the case. See SEC v. Dresser Industries, Inc., 628 F.2d 1368, 1378-79 (D.C. Cir. 1980). In Dresser, the court held that "a court may decide in its discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions 'when the interests of justice seem[] to require such action....'" Id. at 1375, quoting United States v. Kordel, 397 U.S. 1, 90 S. Ct. 763 (1970). While the potential for harm is clearest when the party defending simultaneous civil and criminal proceedings is under indictment, the potential for harm is equally present when the criminal case is in the investigative stage. The potential for harm is increased when, as in this case, the party subject to simultaneous proceedings is being opposed by a hostile, non-governmental third party who is unconstrained by due process considerations. In this case, pursuant to the Board's Order, petitioner Mosbaugh would

receive broad discovery rights while GPC would be kept "ignorant" of information relevant to this proceeding.

Mr. Mosbaugh's hostility towards GPC transcends this administrative proceeding. In June 1990, he filed a claim against GPC with the Department of Labor which has been decided, in GPC's favor, by an administrative law judge and which Mr. Mosbaugh has appealed to the Secretary of Labor. On September 11, 1990, Mr. Mosbaugh filed a petition with the NRC containing numerous allegations of wrongdoing on the part of GPC employees, some of which allegations form the basis for his case in this proceeding. It is also clear that Mr. Mosbaugh has been assisting investigators in the NRC Office of Investigations with the DOJ investigation. See, e.g., Amendments to Petition to Intervene and Request for Hearing of Allen L. Mosbaugh, dated December 9, 1992, n. 13. Additionally, Mr. Mosbaugh and his counsel have utilized the media to publicize his allegations. See a compendium of recent news articles attached hereto as Exhibit A. Mr. Mosbaugh's past actions indicate that he is likely to use this proceeding to seek information that could be improperly used in the DOJ investigation. He is also likely to use this proceeding to further sponsor publicity in the media harmful to GPC and its employees.^{4/} GPC submits that such adverse publicity and

^{4/} Indeed, at the end of the January 12, 1993 prehearing conference, Mr. Mosbaugh's counsel indicated that the proposed license amendments should be denied to "alert[] the public to the fact that [GPC's] current management structure is potentially liable for criminal conduct...." Tr. 105.

other injury it will incur if the stay is not granted constitute special circumstances which require a stay in this case in the interests of justice and fairness.

Aside from the potential harm that GPC will incur if this stay is denied, the Board itself was cognizant of the conflict between going forward with this proceeding and the resulting adverse effect on the DOJ investigation were GPC to discover the "contents of the investigation."^{5/} Board's Order at 26. The Board suggests that "a protective order and an insulating wall" might harmonize these conflicting interests. Implementation of the Board's suggestion, however, will cause substantial prejudice to GPC in this case. Because at least some unknown part of the allegations that will be litigated in this case are also being investigated by DOJ, there does not appear to be any way for GPC to receive a fair hearing. The potential subjects of the investigation, and their respective legal counsel, will be kept "ignorant of the contents of the investigation." GPC would effectively be denied its due process right to a fair hearing.^{6/} Further, the NRC Staff has

^{5/} Should this proceeding go forward, GPC expects to fully exercise its right to discovery in order to obtain all information relevant to the admitted contention and its bases.

^{6/} The Board's Order, at 25, acknowledges that GPC suffers from being denied access to confidential documents which could permit GPC to rebut the basis for Mr. Mosbaugh's contention. Indeed, it is highly likely that portions of tape recordings which have not been made available to GPC contain information helpful to GPC's case.

apparently concluded that a stay is appropriate in light of the conflict identified by the Board.^{1/}

With respect to the first factor of Section 2.788, GPC believes it has an excellent chance of succeeding on the merits of its appeal on the following grounds:

1. The Board erred in finding that Mr. Mosbaugh has standing to intervene. Mosbaugh asserted standing on the basis of one week per month visits to property he owned 35 miles from Vogtle, without any showing of a specific increased risk and concrete injury.^{8/} Such intermittent proximity is not sufficient to establish standing under Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989). The Board also erred in finding that there is an "obvious potential for offsite consequences" which flow from the proposed license amendments. Because there will be virtually no change in the personnel who operate the plant after the license amendments are issued, there can be no increased risk causally related to the amendments. It is abundantly clear that Mr. Mosbaugh has not identified any

^{1/} Other proceedings have been stayed by the Commission pending the completion of a criminal investigations. See Edward Hines, Jr. Medical Center (Veterans Administration), ALJ-88-1, 27 NRC 475, 477 (1988) and cases cited therein.

^{8/} The Board also ignored the false statements made by Mr. Mosbaugh in his pleadings concerning his, and his family's residence and other contacts with Plant Vogtle. See GPC's Brief in Support of its March 3, 1993 Notice of Appeal, dated March 3, 1993, at 11.

proposed change that would affect the safety of Plant Vogtle. Instead, his allegations challenge current management.

2. The Board erred in concluding that, if the Board denies the proposed license amendments, Mr. Mosbaugh's alleged harm will be abated because it is the existing operating personnel who are the subjects of Mr. Mosbaugh's allegations. In this case, as the Board observed in its November 17, 1992 Order, at p. 5, the Board can only stop the license amendments from being issued which will leave the existing personnel in control of operation of the plant.^{2/} Mr. Mosbaugh has not demonstrated that, but for the particular action he challenges, the injury of which he complains would abate. See Public Service Company of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 267 (1991).

3. The Board erred in finding that Mr. Mosbaugh's contention met the NRC's requirements for contentions, contained in 10 C.F.R. § 2.714(b)(2)(iii). The Board held, in effect, that Mr. Mosbaugh has demonstrated that GPC's application for license amendments failed to contain information required by law because the application did not include Mr. Mosbaugh's allegations. Board's Order at 13. However, nowhere in the record is there any basis for concluding that Mr. Mosbaugh

^{2/} The Board's Order, at 23, in quoting the NNEC case suggests that GPC might be willing to accept a modification of the license amendment as a condition of issuance. However, GPC could very well choose not to accept such conditions in order to maintain the existing organization in control of Vogtle operations.

alleged that GPC's application was deficient in any way. On the contrary, it is the current organization of which he complains. See January 12, 1993 prehearing conference transcript at 109. Moreover, the Board erred in admitting a contention outside the scope of the present proceeding. The allegations do not relate to any change proposed by the license amendments.

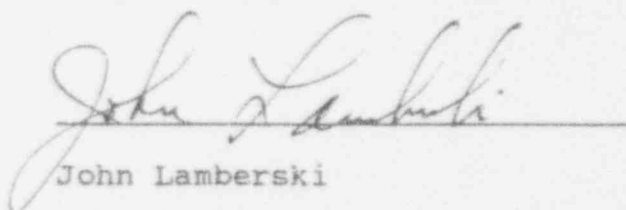
The third factor of 10 C.F.R. § 2.788 is whether the granting of a stay would harm other parties. The stay requested by GPC would not harm the NRC Staff. Indeed, according to counsel for the NRC Staff, the NRC Staff favors such a stay for its own interests. The stay requested herein also would not harm Mr. Mosbaugh since it would simply preserve the status quo. The stay would diminish the potential for unwarranted harm and disruption to, and infringement of, individual rights of existing personnel who are the subjects of Mr. Mosbaugh's allegations.

The fourth and final factor of Section 2.738 is: where does the public interest lie? During the pendency of the stay requested herein, the Plant Vogtle organization will remain in the current phase of formation of Southern Nuclear. In contrast, if this stay request is denied, cumbersome procedures will be required which may prove insufficient to both protect the DOJ investigation and ensure GPC a fair hearing in this proceeding. GPC submits that, under the circumstances, the public interest favors a stay.

IV. Conclusion.

For the reasons stated herein, GPC respectfully requests that the Board's February 18, 1993 Memorandum and Order admitting a party be stayed pending a decision by the Commission on GPC's appeal of the Board's Order.

Respectfully submitted,



John Lamberski

TROUTMAN SANDERS
Suite 5200
600 Peachtree Street, N.E.
Atlanta, GA 30308-2216
(404) 885-3360

Ernest L. Blake, Jr., Esq.
David R. Lewis, Esq.

SHAW, PITTMAN, POTTS &
TROWBRIDGE
2300 N Street, NW
Washington, DC 20037
(202) 663-8084

Counsel for Georgia Power
Company

DATED: March 4, 1993

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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OFFICE OF SECRETARY
DOCKETING & SERVICE
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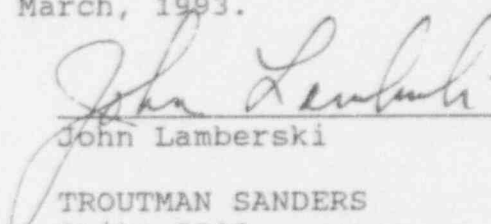
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* Docket Nos. 50-424-OLA-3
* 50-425-OLA-3
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* Re: License Amendment
* (Transfer to Southern
* Nuclear)
*
* ASLBP No. 96-671-01-OLA-3

CERTIFICATE OF SERVICE

This is to certify that copies of the within and foregoing "Georgia Power Company's Application for a Stay of the Licensing Board's February 18, 1993 Memorandum and Order Admitting a Party" were served on all those listed on the attached service list by depositing same with an overnight express mail delivery service.

This is the 4th day of March, 1993.


John Lamberski

TROUTMAN SANDERS
Suite 5200
600 Peachtree Street, N.E.
Atlanta, GA 30308-2216
(404) 885-3000

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SERVICE LIST

Ivan Selin, Chairman
U.S. Nuclear Regulatory
Commission
One White Flint North
11555 Rockville Pike
Rockville, Md. 20852

Kenneth C. Rogers,
Commissioner
U.S. Nuclear Regulatory
Commission
One White Flint North
11555 Rockville Pike
Rockville, Md. 20852

James R. Curtiss,
Commissioner
U.S. Nuclear Regulatory
Commission
One White Flint North
11555 Rockville Pike
Rockville, Md. 20852

Forrest J. Remick,
Commissioner
U.S. Nuclear Regulatory
Commission
One White Flint North
11555 Rockville Pike
Rockville, Md. 20852

E. Gail de Planque,
Commissioner
U.S. Nuclear Regulatory
Commission
One White Flint North
11555 Rockville Pike
Rockville, Md. 20852

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory
Commission
One White Flint North
11555 Rockville Pike
Rockville, Md. 20852

Administrative Judge
Peter B. Bloch, Chairman
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Administrative Judge
James H. Carpenter
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Administrative Judge
Thomas D. Murphy
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Michael D. Kohn, Esq.
Kohn, Kohn & Colapinto, P.C.
517 Florida Avenue, N.W.
Washington, D.C. 20001

Stewart D. Ebnetter
Regional Administrator
USNRC, Region II
101 Marietta Street, NW
Suite 2900
Atlanta, Georgia 30303

Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D. C. 20555
ATTN: Docketing and Services
Branch

Charles Barth, Esq.
Office of General Counsel
One White Flint North
Stop 15B18
U.S. Nuclear Regulatory
Commission
Washington, D. C. 20555

Augusta Chronicle
2/24/93

NRC board agrees to hear whistle-blower's petition

By John Winters
Staff Writer

WASHINGTON — An administrative board has agreed to hear a petition alleging a subsidiary of The Southern Co. lacks the "character, competence and integrity" to operate Plant Vogtle.

In a Feb. 18 ruling, the Nuclear Regulatory Commission's Atomic Safety and Licensing Board granted a petition from former Georgia Power Co. official Allen Mosbaugh to hear his allegations.

He alleges company officials lied about the reliability of emergency equipment — namely diesel generators — at Plant Vogtle after a March 1990 site area emergency in an effort to get permission to restart a nuclear reactor.

The ruling came in the midst of

a request from Georgia Power Co. to transfer the operating license of Plant Vogtle to Southern Nuclear Operating Co. Both are subsidiaries of The Southern Co., and the transfer would be a change mainly in name only.

Mr. Mosbaugh petitioned to intervene in the request for the change, arguing that because company officials lied to the NRC, which oversees commercial nuclear plants, the request should be denied.

"We find that there is adequate basis for Mr. Mosbaugh's contention that at least one senior officer of Southern Nuclear is lacking in character and competence and that Southern Nuclear lacks the integrity required of a licensee for the operation of a nuclear power plant," the order said.

"If this contention were sus-

tained, we might direct that the license amendment be denied or conditioned on changes in the structure and personnel of Southern Nuclear," it concluded.

The ruling is similar to that of a grand jury finding sufficient evidence to take a case to trial. No decision is expected for several months.

Georgia Power spokesman Tal Wright said, "We are disappointed in the board's decision and will appeal it. It is important to note that the board recognizes that Mr. Mosbaugh's allegations have not been proven."

The U.S. Justice Department currently is conducting a criminal investigation into some of Mr. Mosbaugh's allegations.

His attorney, Michael Kohn, said he believes that investigation will be completed within six

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Ultimately, it is the tape recordings that enabled Allen Mosbaugh to protect himself from accusations leveled against him by Georgia Power that he was responsible for the submission of false information to the NRC.

**Michael Kohn,
Mosbaugh's attorney**

months.

Mr. Mosbaugh was fired from Georgia Power after it was learned he was secretly taping conversations with employees after the March 1990 incident.

"Ultimately, it is the tape recordings that enabled Allen Mosbaugh to protect himself from accusations leveled against him by Georgia Power that he was responsible for the submission of false information to the NRC," Mr. Kohn said.

Thursday, Feb. 25, 1993



The Atlanta Journal
The Atlanta Constitution

LOCAL NEWS

F6 Thursday, February 25, 1993 ***

Whistleblower to air Plant Vogtle complaints

ASSOCIATED PRESS

Washington — A federal licensing board has agreed to hear the case of a whistleblower who claims he can prove that the management of Georgia Power Co.'s Plant Vogtle lacks the competence and integrity to operate a nuclear plant.

The decision by the Nuclear Regulatory Commission's Atomic Licensing and Safety Board stems from allegations by Allen L. Mosbaugh that Georgia Power managers lied to the NRC after a 1990 accident at the two-reactor plant near Waynesboro.

The allegations by Mr. Mosbaugh, a former senior manager at Plant Vogtle who was fired in September 1990, also are the subject of a federal criminal investigation, according to NRC documents.

Michael Kohn, Mr. Mosbaugh's attorney, said Wednes-

day the licensing board's decision to hear the evidence ultimately could affect the operation of two other nuclear plants in the Southern Co. system, Plant Hatch near Baxley and Farley Nuclear Plant near Dothan, Ala.

If the board accepts Mr. Mosbaugh's arguments in this case, Mr. Kohn said, "Georgia Power and Alabama Power are going to have to show the NRC they have replaced the management of their nuclear facilities with qualified, competent people of high integrity before they will be allowed to continue operating their plants."

Georgia Power spokesman Tal Wright said the company was disappointed in the board's decision and will appeal it to the NRC.

"It is important to note that the board recognizes that Mr. Mosbaugh's allegations have not been proven," Mr. Wright said.

Dothan Eagle

(Alabama, February 25, 1993)

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Wiregrass/Nation

Farley could be affected by case involving Georgia plant

From Staff, Wire Reports

WASHINGTON — In a case which could also affect the Farley Nuclear Plant near Dothan, a federal licensing board has agreed to hear a whistleblower's evidence that management of Georgia Power's Plant Vogtle lacks competence and integrity to operate a nuclear plant.

The decision by the Nuclear Regulatory Commission's Atomic Licensing and Safety Board stems from allegations by Allen L. Mosbaugh that Georgia Power managers lied to the NRC after a 1990 accident at the two-reactor plant near Waynesboro.

The allegations by Mosbaugh, a former senior manager at Plant Vogtle who was fired in September 1990, also are the subject of a federal criminal investigation, according to NRC documents.

Michael Kohn, attorney for Mosbaugh, said Wednesday that the licensing board's decision to hear Mosbaugh's evidence ultimately could affect operation of the Farley Nuclear Plant near Dothan and Plant Hatch near Badley, Ga., both part of the Southern Co.'s system.

If the board accepts Mosbaugh's arguments in this case, Kohn said, "Georgia Power and Alabama Power are going to have to show the NRC they have replaced the management of their nuclear facilities with qualified, competent people of high integrity before they will be allowed to continue operating their plants."

Georgia Power spokesman Tai

Wright said the company was disappointed in the board's decision and will appeal it to the NRC.

"It is important to note that the board recognizes that Mr. Mosbaugh's allegations have not been proven," Wright said.

The board's decision last week came in a case in which Georgia Power is seeking to transfer its operating license for Plant Vogtle to Southern Nuclear Operating Co., another Southern Co. subsidiary.

Because the license transfer would not result in a change in management of the plant, both the NRC staff and Georgia Power opposed Mosbaugh's intervention in the case, arguing that there were no new safety risks.

But the board disagreed, saying that Mosbaugh should not be deprived of his right to intervene "because the material safety deficiencies he has alleged may already be occurring."

The board said it found "an adequate basis" for Mosbaugh's claim that Southern Nuclear Operating Co. President R.P. McDonald "is lacking in character and competence and that Southern Nuclear lacks the integrity required of a licensee for the operation of a nuclear power plant."

If that contention is upheld, the board said, it might deny the license amendment or ask Southern Nuclear to make changes in operation or personnel.

Mosbaugh's most serious allegation is that Georgia Power officials lied to the NRC about the reliability of a crucial backup generator after the 1990 accident at Plant Vogtle.

The accident occurred when a truck hit a power pole and caused a 24-minute blackout, during which the water temperature of the reactor cooling system rose from 80 degrees to 134 degrees.

Mosbaugh claims in a petition filed with the U.S. Labor Department that he was demoted by Georgia Power after he complained about safety problems at the plant.

He contends he was fired when Georgia Power found out he had tape-recorded conversations with other employees at the plant.

Kohn said those tapes were turned over to the NRC and provide the basis for the criminal investigation now being conducted by a federal grand jury in Atlanta.

Mosbaugh's firing has been upheld by a Labor Department administrative law judge.

That ruling has been appealed to Labor Secretary Robert Reich.