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U.S. House of Representatives

Committee on Energy and Commerce

SUBCOMMITTEE ON ENERGY AND POWER

Washington, DC 20515

May 23, 1989

The Honorable Lando Zech
Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Chairman Zech:

Thank you for providing the Subcommittee with the report by Judge Rosenthal concerning allegations made by Douglas Ellison about the conduct of Roger Fortuna and the Office of Investigations.

The 34-page report concludes: "For the foregoing reasons, I recommend a finding that there was no misconduct or dereliction of duty upon the part of Office of Investigations personnel, including Fortuna, in the treatment of the Ellison allegations presented to the NRC in 1986."

The report does not address two other allegations made against Mr. Fortuna: First, that Mr. Fortuna "had inappropriately disclosed to Mr. [Stephen B.] Comley information pertaining to Mr. Ellison and, additionally, had discussed with Mr. Comley sensitive and confidential NRC matters." (p.3, Rosenthal report).

First, I want to commend Judge Rosenthal and his staff on an excellent report. The report clearly lays out the facts and reaches what I believe to be an appropriate conclusion. Moreover, its additional recommendations concerning procedures to be followed in future cases are commendable.

It is now an appropriate time for the Commission to consider reinstating Mr. Fortuna to his past position as Deputy Director of the Office of Investigations. As I understand it, there are only two remaining allegations concerning Mr. Fortuna. With respect to his disclosure of information concerning Mr. Ellison to Mr. Comley, it appears that Mr. Comley was already aware of the information.

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Moreover, the information had been reported in newspapers and was not confidential. Mr. Fortuna was well within his rights to discuss this matter.

With respect to the allegation that Mr. Fortuna disclosed confidential NRC matters to Mr. Comley, there is no specific evidence in the record reviewed by the Subcommittee staff. There is no evidence that any NRC investigation was compromised. Unless the Commission has further evidence of wrongdoing other than Mr. Ellison's unsupported allegation, it makes no sense that Mr. Fortuna should be prevented from resuming his previous responsibilities.

The only reason remaining for not reinstating Mr. Fortuna in his current position is his initial refusal to be interviewed on tape by the former Director of the Office of Inspector and Auditor, Ms. Sharon Connelly and her deputies. Mr. Fortuna subsequently did consent to such an interview with Judge Rosenthal. In my view, Mr. Fortuna had adequate reason to be wary of an interview with Ms. Connelly, having once testified against her in a personnel matter. Indeed, the Commission acknowledged the situation when it removed Ms. Connelly from the case.

Moreover, I think it is particularly important that in the absence of any specific evidence of wrongdoing by Mr. Fortuna, he should be reinstated pending the outcome of the investigation, because it appears that his whole removal may have been caused primarily by Ms. Connelly's motives to destroy the Office of Investigations. Both the House and Senate were clearly on record last year in favor of a strong and independent Office of Investigations, and your failure to reinstate Mr. Fortuna particularly in light of Judge Rosenthal's report, would thwart this policy.

Judge Rosenthal has acknowledged in his initial report that he conducted no further interviews with Mr. Ellison, "prompted by the fact there is sufficient doubt as to Ellison's credibility as a witness." In a Justice Department declination letter, the Department referred to Mr. Ellison as "a very slender reed" upon which to base any criminal action. Yet it appears that it is basically unsubstantiated allegations by Mr. Ellison that are responsible for Mr. Fortuna's state of employment.

Finally, I note that Judge Rosenthal is currently involved in litigation with Mr. Comley concerning testimony and access to tapes. The fact that this litigation could drag on for months should not be used to punish Mr. Fortuna.

Having dealt with Mr. Fortuna's situation, I now turn to the more troubling aspects of this case. The Subcommittee staff has reviewed hundreds of documents on this case (prior

to its removal to Judge Rosenthal). The file raises very serious questions about this case and these are discussed in detail in the attached report of the Subcommittee staff.

In general, my concerns center around the following issues:

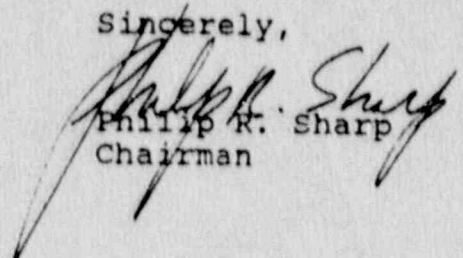
1. Ms. Connelly did not appear unbiased in this case, because of her past interaction with Mr. Fortuna, yet personally directed the investigation.
2. There is ample evidence in Ms. Connelly's notes that her primary motive was to "get" Mr. Fortuna.
3. Ms. Connelly persisted in the investigation even after the Department of Justice found absolutely no wrongdoing on Mr. Fortuna's part and even noted that he appeared to have acted appropriately.
4. Ms. Connelly took the extraordinary step of paying Mr. Ellison \$6,000 after receiving a legal opinion from the General Counsel that payments to informants were probably not authorized by law.
5. Although Mr. Ellison made some additional charges concerning safety at Nine Mile Point and management misconduct, and the payment to Mr. Ellison was predicated upon a finding that important health and safety issues were involved, there appears to have been relatively little investigation of these charges since Mr. Ellison made them in August.
6. The Commission continues its investigation over whether Mr. Fortuna inappropriately disclosed to Mr. Comley that Mr. Ellison had been arrested on a morals charge, yet appears to have conducted no investigation on a more serious allegation made by Mr. Ellison: namely, that Niagara Mohawk management manufactured the charge against him in retaliation for his whistleblowing.
7. Ms. Connelly's deputies, Frederick Herr and Mark Resner, apparently provided sworn affidavits in Mr. Fortuna's lawsuit against the NRC which appear to be inaccurate in several accounts.

In summary, despite a lack of credible evidence against Mr. Fortuna of wrongdoing, he has been subjected to severe costs to his career, as well as legal costs. At the same time that Mr. Fortuna has been subjected to this significant scrutiny, there has been no investigation of the questionable procedures followed in this investigation, nor has there been any significant investigation of any of the new allegations made against the utility management.

I am pleased to learn by a letter dated May 22, 1989 from Acting Inspector General Martin Malsch that you have asked him to review this matter. I have also requested the General Accounting Office to review the contract with Mr. Ellison to determine whether the expenditure was authorized, and if not, whether the Government can seek restitution from those who authorized the payment.

I would appreciate the Acting Inspector General keeping the Subcommittee informed of his investigation on a periodic basis. Please also inform me what, if any, steps will be taken with respect to Mr. Fortuna.

Sincerely,


Philip R. Sharp
Chairman

Enc.

cc: Martin G. Malsch, Acting Inspector General
Judge Alan Rosenthal

PHILIP R. SHARP, INDIANA, CHAIRMAN

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U.S. House of Representatives
Committee on Energy and Commerce

SUBCOMMITTEE ON ENERGY AND POWER

Washington, DC 20515

May 23, 1989

MEMORANDUM

To: Hon. Philip R. Sharp, Chairman

From: Subcommittee Staff

Re: The Fortuna case

Introduction

A review of documents in the Roger Fortuna case provides evidence of a wasteful investigation with revenge the primary motive.

Roger Fortuna was Deputy Director of the Office of Investigations (OI). He was suspended when he refused, on advice of counsel, to submit to a recorded interview under oath to be conducted by Sharon Connelly, the Director of the Office of Inspector and Auditor (OIA). He has since agreed to such an interview, but has been reassigned within the NRC pending the completion of the investigation. In the meantime, Ms. Connelly was relieved of her supervision of the case, and subsequently, at her request, transferred to another office.

Fortuna had cause for concern. He had testified against Connelly in an employment discrimination case that led to her being chastised by the Department of Justice, and caused Congressmen Udall, Gejdenson, and Markey to call for her ouster. Moreover, the two offices had a running feud.

Fortuna was under investigation because of allegations made by Douglas Ellison, a former employee at the Nine Mile Point nuclear plant, who had been a whistleblower in 1986. Ellison had provided Connelly with tapes which he believed showed wrongdoing on Fortuna's part.

OIA had already interviewed Fortuna once on the matter in November, 1988. However, Fortuna and his lawyer believed that OIA was seeking the second interview with a verbatim transcript in hopes of tripping him up based upon recordings supplied by Ellison.

On May 2, 1989, Judge Alan Rosenthal, who had assumed responsibility for the case, issued a preliminary report in which he found no evidence of dereliction of duty or misconduct on Fortuna's part in the handling of the Ellison allegations about Nine Mile Point. The report does not deal with allegations that Fortuna provided sensitive information to Mr. Stephen Comley.

A review of the case files on this matter revealed several facts that suggest the primary purpose of the investigation was personal revenge:

- Connelly listed three objectives for her investigation in her personal notebook. Two related to safety matters, but at the top of the list, circled, was "Dispose of RF".

- Connelly appears to have orchestrated the investigation to fire Fortuna. In a notebook entry, apparently written in the fall of 1988, she wrote, "30 days - notice of an adverse action", "next step - get manage to direct him to come - at a certain time then proposed adverse action" "Dep. Off. Director will be held to a higher std."

- Connelly took the extraordinary step of paying Ellison \$6,000 for his tapes and testimony in a supersecret contract with the approval of Victor Stello, the agency's top staff person, and his assistant James Blaha, who distributed the money in cash. The contract was even more questionable in light of the following facts:

- Connelly had requested a legal opinion about the legality of establishing a fund for informant money, and was told that it was probably unauthorized; Although the General Counsel told her that should see seek to pay an informant, she should first seek his advice, there is no written record that this occurred (in subsequent answers to Congressional inquiries, the General Counsel says the matter was discussed in general terms);

- Ellison had admitted previously to NRC officials that he had lied about taking radioactive materials to his home;

- Ellison had a conviction for attempted sexual misconduct with a thirteen year old girl;

-- Ellison had admitted that he was desperate for money; he had previously attempted to sell his tapes to his former employer in an apparent attempt at extortion; he had also attempted to sell the tapes to antinuclear activist Stephen Comley;

-- The Commission has cited as one of its authorities for its investigation section 161 of the Atomic Energy Act, and it clearly could have subpoenaed the tapes and testimony for free;

-- Based upon the meager work product of Ellison, it appears that despite the claim he was being paid on the basis of \$40 per hour, he was actually being paid for the tapes.

-- Connelly persisted with her investigation despite the fact that the Justice Department had declined any criminal prosecution. In their declination letter they noted:

-- The tape recordings "do not disclose that Mr. Fortuna participated in the commission of any criminal offense". The letter went even further, noting that Fortuna's actions appeared to be very proper and well within his rights.

-- "Besides that fact, Ellison appears to be a very slender reed" upon which to build a case. They point out that his value as a witness would be limited because of his sex offense, extensive absence for mental health, periods of unemployment, his taping practices may have violated state laws, and "Moreover, you paid him \$5,000."

-- Although in normal circumstances the appropriate official to handle any adverse personnel action involving Fortuna would be his superior, Ben Hayes, Director of OI, he was purposely kept out of the matter. Also,

-- Hayes wrote in a memo that it was not clear whether the purpose of the ongoing investigation was to get facts or fire Fortuna;

-- The recommending official was Hayes's superior, Hugh Thompson. Thompson had a meeting with Stello on the matter. Stello, who had authorized the secret contract with Ellison, would clearly have had a motive to be vindicated in the payment of the cash.

-- Chairman Zech has stated that the Commission has tried to distance itself from the ongoing investigation, but there is evidence that Connelly intended to play the tapes for him, although there is no written evidence that this took place. (Subsequent answers to Congressional inquiries indicate that the chairman and Commissioners were briefed.)

Doug Ellison: Whistleblower

Doug Ellison first came to the attention of the NRC when he brought 14 allegations of wrongdoing at Nine Mile Point in July, 1986. The allegations were generally of the nature that proper procedures were not being followed, uncertified parts were being used, unqualified technicians were doing the work, etc. In response to the allegations, the NRC told the utility to investigate the allegations and provide a report.

[Note: Ellison had reason not to be pleased with the NRC's attitude. When he brought the allegations to the NRC, it was strongly suggested that instead he bring the allegations to the attention of the company instead. Moreover, as stated above, the NRC left it to the company to investigate itself.]

The utility's investigation actually substantiated most of Ellison's allegations, but not surprisingly, determined that they didn't represent a safety problem. NRC officials reviewed the report and determined that the investigation was reasonably accurate, but too narrowly focused, and recommended additions to the report. The final result was a report that generally substantiated the allegations and chastised the company for failing to follow procedures. The utility was given a \$50,000 fine.

This result did little to hearten Ellison. He had experienced harassment and intimidation by his coworkers, and had been arrested on a morals charge that he believes was a set-up job by the utility. He sued the company in a Department of Labor whistleblower protection proceeding, and eventually settled for \$25,000, leaving the company.

He did receive a brief "day in the sun" during the case, and appeared to want to pursue his whistleblower status. He became particularly excited when he came into contact in the fall of 1986 with Stephen Comley, an anti-Seabrook activist. Comley had explained to him that his goal was to expose the NRC as an agency that failed to regulate the nuclear industry.

Comley, who was viewed by Connelly as a "flake" (according to the DOJ declination letter, discounting the value of his testimony), is a nursing home operator with

considerable resources. He also was a good promoter, using stunts such as flying a plane over Washington with a banner asking for a meeting with Reagan.

Comley had apparently been dealing with the press on a story about the nuclear industry and the NRC. The documents leave considerable room for the imagination since we learn of this through descriptions by Ellison of descriptions by Comley. Both probably have reason to exaggerate their importance.

In any event, Ellison was quite excited by his association in this high visibility adventure. Comley apparently invited Ellison to Washington to join him in a meeting with the U.S. Attorney. Comley apparently was attempting to convince him to reopen a case. He apparently was going to bring Ellison along as another whistleblower whose case was not fully dealt with.

The night before the meeting Comley and Fortuna spoke on the phone. According to Judge Rosenthal's report, two telephone conversations between Fortuna and Comley took place and were recorded either by Comley or Ellison. According to the Rosenthal report, Ellison claims Comley taped the conversation and vice versa. Ellison believed that in these conversations, Fortuna improperly disclosed to Comley information about Ellison, and discussed sensitive and confidential NRC matters.

[Judge Rosenthal has requested that the actual discussions not be described publicly at this time. The tapes were made available to the Department of Justice. They reviewed the tapes and found no evidence of criminal wrongdoing on Fortuna's part, and noted that he was free to advise Comley as he saw fit.]

Ellison and Comley had a parting of the ways, and Ellison then tried to go it alone. He phoned Fortuna several months later to complain that Nine Mile Point was getting a license. Fortuna basically empathized with his plight, but clearly tried to put him off. Fortuna apparently was aware that Ellison taped all calls, and that Ellison might have been trying to get him to say something that could be seen as incriminating.

Ellison subsequently complained in late 1987 and early 1988 that his allegations were not being pursued. Actually, the technical allegations were pursued. To the extent that criminal wrongdoing was alleged, it was the responsibility of OI to look into the matter, but they apparently gave it a very low priority, and did little more than review the utility's report. The fact that the case was technically kept open apparently was the trigger for Ellison believing that something was being covered up.

The OI investigation was closed in 1988. Fortuna sent the case to the U.S. Attorney's office, in case they wanted to pursue it further. As stated earlier, Judge Rosenthal found no wrongdoing or dereliction of duty on the part of Fortuna and other OI officials.

The Doug Ellison Contract

In the summer of 1988, Ellison became increasingly desperate. He was out of work and was about to be evicted. He then decided to call Niagara Mohawk, his former employer, to try to sell them his "memoirs". They refused.

He then called Comley, who had previously loaned him \$2,500 if he would put his story together. He asked Comley to pay him so that he wouldn't have to turn the tapes over to the utility. Comley refused, reminding him that he still owed the \$2,500, and had done no work.

He then got in touch with OIA. By then he had turned on Fortuna, believing him to be the cause of Comley dismissing him. He also believed that Fortuna had discouraged the U.S. Attorney from pursuing the matter. He noted that he was about to be evicted and asked for \$5,000. Connelly agreed to the proposal.

Connelly checked out the possibility of setting up an "informant slush fund", but was warned against it by the Office of General Counsel. In an August 25, 1988 memo from General Counsel William Parler to Connelly, he discussed her request on the legality of an informant's fund:

"I am not aware of any budget justification data in our existing authority which would authorize the establishment of such a fund."

Parler then stated that if a situation arose in which the informant had information that was essential to carrying out an investigation that related to the agency's public health and safety mission, Connelly should provide the facts and seek OGC advice on the specific matter. There is no written evidence that OGC was informed, although in subsequent responses to Congressional inquiries, Parler states that he discussed the matter at a meeting with Stello and Connelly. Parler was informed that there could be safety issues involved, but "no one discussed the specific circumstances of the matter."

Parler also stated that he agreed with the conclusions in an attached legal memorandum on the subject. The memo stated:

"a determination that such expenditures are authorized would not be on sound legal ground given that the Atomic Energy Act, Energy Reorganization Act, and appropriations along with legislative histories are all silent.

"For the foregoing reasons, we are unable to conclude that such expenditures would be authorized."

With full knowledge of the Parler memorandum, she nonetheless went to Stello, who approved the deal, after the meeting described above. She wrote in a memo to Stello on September 1, 1988 that the information was "relevant, necessary, and essential" and that Ellison would "not provide this information unless he is reimbursed for services and documentation he provides".

Stello apparently received disbursements of cash in \$1,000 and \$2,000 increments during September, 1988. These sums were then disbursed to his assistant Blaha, who kept track of expenditures and reimbursements in his notebook. The plane tickets were made out in Blaha's name.

The whole financial arrangement seems to be extremely abnormal. Several documents acknowledge the cash disbursements. One overall document signed by Stello states:

"I have obligated and approved for payment the amount of \$8,122.58 for the necessary expenses of the U.S. Nuclear Regulatory Commission in carrying out the purposes of the Energy Reorganization Act, as amended, and Atomic Energy Act, as amended."

Ellison was brought to Washington and put up at Embassy Suites. The contract paid him at \$40 per hour and a subsistence pay of about \$150 per day. The combined total paid him about \$6,000. In addition, expenses for the hotel, transcribing the tapes, and miscellaneous expenses were another \$2,000, making the total cost at over \$8,000.

Based upon the work product (which consisted of a few pages discussing the tapes), it difficult to believe that the payment was for hourly work rather than the tapes. Ellison did help to edit transcripts and provide a handwritten description of some of the tapes, but it is not clear that this work product proved of much value. Since Connelly and Stello appeared to use the consultant contract, rather than an informant payment, to receive authorization for making payments to Ellison, it appears that the use of an hourly wage may have taken place to avoid the appearance of an informant payment for tapes.

Ellison submitted to just one on-the-record interview, and it dealt solely with Fortuna. His allegations that the utility had set him up on the morals charge, that his complaints of shoddy workmanship at the plant were not thoroughly investigated, and that others at the NRC had failed to take appropriate action were discussed at length in other off-the-record interviews. All of the allegations receive some minor attention in Connelly's notes. However, the sole purpose of the on-the-record interview was to deal with Fortuna.

All of the material was sent to the Justice Department. As stated above they declined prosecution. They noted that in one tape, Ellison tried to get Fortuna to give him a file out of channels, and that he properly told him to file an FOIA request. They noted that Fortuna was entirely within his rights to give whatever advice he wanted to Comley, and disclosed no privileged information.

In some cases, such as the employment discrimination case involving Connelly, the declination letter suggests that administrative action be taken instead. In the Fortuna declination letter, however, it is clear that DOJ could find no evidence of wrongdoing that would even warrant an administrative action. [It is unclear whether Thompson, in recommending the adverse action against Fortuna was aware of the DOJ declination letter.]

Nonetheless, Connelly pursued the investigation. She questioned Fortuna, as well as others who had handled the case. She did not question him about his dealings with Comley or about the phone conversations. Instead, she apparently saved that line of questioning for an on-the-record interview.

Fortuna Gets Suspended

On advice of his lawyer, Fortuna refused to answer questions until the NRC could provide its legal authority for compelling the testimony. As a result, Fortuna was suspended and actions to terminate his government service were begun. Fortuna's lawyer has requested a temporary restraining order from the Federal District Court. At the court argument, lawyers for the NRC contended that Fortuna could be fired because he refused to cooperate, and indicated they were unsure whether Fortuna's testimony was still being sought.

Subsequently, Fortuna agreed to an on-the-record interview with Judge Alan Rosenthal who replaced Connelly on the case. Fortuna was then placed in a job at the FOIA office at the NRC. The potential employee action remains.

Also, Connelly, who was relieved of her supervision over all cases involving OI personnel, requested, and was granted, a transfer to the Office of the Comptroller.

Side Issue: Asselstine/Austin

In a side development, Ellison claimed that Asselstine and/or his assistant Austin breached his confidentiality. He had spoken with both of them concerning his allegations at Nine Mile Point.

At one point he apparently played a tape in which he talked about taking radioactive parts to his home. In a phone conversation with Austin, Austin tells him in strong terms that keeping the radioactive material is a potential criminal violation and that he should return it.

The next day Ellison was called by plant security to find out if he had radioactive material. He denied it. It is apparent that Austin told someone at the NRC who notified the plant.

Ellison in conversations admits that Austin and the NRC had a responsibility to follow up on the matter, and that they were "just doing their job". However, in attempting to sell his story to Connelly, he turns the episode into a charge against Asselstine.

Side Issue: False Statements by NRC Officials

In affidavits filed by OIA investigators Herr and Resner, filed as part of the Fortuna litigation, they both state:

"In October-November, 1988, OIA was conducting an investigation to which Mark E. Resner and I were assigned. The investigation concerned the manner in which OI considered and acted upon allegations from Douglas Ellison, a former employee at the Nine Mile Point 2 nuclear power facility, about the safety of that facility.

"Plaintiff Fortuna was interviewed on the Ellison matter by Defendant Resner and myself informally, not on-the-record, on or about November 4, 1988. Subsequent investigation and information obtained by OIA led OIA to conclude that another interview would be necessary. The questions OIA planned to ask Plaintiff Fortuna at this subsequent interview would focus on the manner Fortuna himself performed his official duties in the Ellison matter."

[The Resner affidavit is identical with the substitution of the words Frederick Herr for Mark Resner.]

Based on the documents reviewed by staff, these sworn statements appear to be knowingly false in several respects:

1) The investigation began in September when Ellison was interviewed. The October-November reference may have been used to hide fact that Ellison had been paid for his information and interviews in September. (In subsequent answers to Congressional inquiries, the NRC advise that approximately 173 hours were expended in September, compared to 48 hours in October, and 90 hours in November.)

2) The script of questions indicate that the line of questions had only little to do with his handling of the Ellison case and much to do with his dealings with Comley on other matters.

3) There is absolutely no evidence in any documents that a) there was a subsequent investigation after the first Fortuna interview, or b) that subsequent information was obtained by OIA. In fact not a single question prepared for the Fortuna interview is based upon any information not provided by Ellison in September.

[Note: Except where indicated, this memorandum was based solely on a review of documents provided by the NRC pursuant to a February 23, 1989 request for documents. NRC officials reviewed the facts described in the memorandum, and helped to clarify ambiguous documents. All conclusions reflect the views of Subcommittee staff.]