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November 9, 1993

VIA EXPRESS MAIL

Mr. James Lieberman
Director
Office of Enforcement
Mail Stop 7H1, 7H5
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852

Dear Jim:

This follows up our conversation in Phoenix just prior to the morning session of NRC's workshop exploring its role in the 211/50.7 process. You may recall that I expressed a concern that regardless of NRC's role in the process, the most fundamental and disturbing shift I see is the apparent movement toward policies that would criminalize this difficult employment law issue. If this trend continues it appears to me that nuclear managers will be increasingly chilled, if not paralyzed, from taking legitimate management action against persons who also may have raised safety concerns. Although an employee's performance may be substandard or even clearly violate licensee policies or NRC regulations, managers will be reluctant to act if the employee has also raised safety concerns because the potential consequences of being misunderstood are simply too great, i.e., the prospect of being prosecuted for a federal crime.

I cited as an example the current grand jury in Houston reviewing [redacted] termination at the South Texas Project (STP). While I am currently involved in several regulatory proceedings relating to [redacted] employment at another nuclear plant site and our firm has served as nuclear regulatory counsel to Houston Lighting & Power (HL&P) for many years, I have not been personally involved in the proceedings relating to the termination of [redacted] employment at the STP site. From what I understand, however, [redacted] unescorted access to the STP site was properly revoked after it was determined that he had omitted from his access authorization request form numerous items of information specifically required for necessary

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background checks to determine the trustworthiness and reliability of persons seeking unescorted access to the protected areas of nuclear facilities. HL&P submitted detailed information concerning the circumstances surrounding the revocation of [REDACTED] site access in an August 14, 1992 letter from [REDACTED] a copy of which is enclosed for your information. Essentially, many of these omissions concealed highly negative information that is significant in the context of the access authorization rule (10 CFR 73.56) including:

- involuntary termination by three separate employers during the previous three years (the fact that he had worked for these employers was also omitted, making it difficult to detect the fact that termination had even occurred, let alone the circumstances associated with his termination);
- the for-cause revocation of his site access at another nuclear facility; and, ^{1/}
- his participation in litigation, the results of which were decisions concluding that he was insubordinate, a poor performer, and that his activities had adversely affected the ability of site management to safely operate a nuclear plant.

In addition, there were numerous other omissions of fact throughout [REDACTED] access paperwork. Apparently, when presented with an opportunity to correct a number of these omissions during his initial processing and a subsequent follow-up interview at the STP site, [REDACTED] failed to do so. By concealing this information, he prevented STP access authorization personnel from discovering many facts about his background that are obviously material to a proper determination, pursuant to NRC regulations, as to his trustworthiness and reliability.

The denial of [REDACTED] access came only a few months after the NRC had issued Information Notice 91-59 to

^{1/} In this regard, 10 CFR 73.56(b)(4) states: "failure by an individual to report any previous suspension, revocation, or denial of unescorted access to nuclear power reactors is considered sufficient cause for denial of unescorted access authorization."

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licensees specifically stressing the importance of assuring that background records used for access purposes should be complete and accurate, and informing them that the NRC would hold them accountable and take escalated enforcement action if persons were allowed access based on falsified or incomplete records. A copy of that information notice is enclosed. This notice particularly emphasizes the importance of assuring that employment history records are accurate and complete. NRC again emphasized its concern in assuring the accuracy of records recently on October 20, 1993, in Generic Letter 93-03, "Verification of Plant Records." A copy of that generic letter is also enclosed. Yet, the decision of HL&P personnel, following the NRC's regulations and guidance and the Company's own procedures, to revoke [REDACTED] access now apparently puts them and the Company in jeopardy of criminal prosecution. It is difficult to imagine a greater disincentive to compliance with the NRC's regulations and guidance.

Based on these facts, I cannot discern the criteria used by the NRC in referring this case (which has not yet been tried before the DOL) for criminal review while not referring numerous other 211 claims which have resulted in findings of discrimination. This is particularly confusing when [REDACTED] omissions and misstatements clearly violated 10 CFR 50.5(a)(2), and yet the NRC does not appear to be either investigating his misstatements or taking enforcement action against him as contemplated by that rule.

You indicated that the distinction between [REDACTED] Houston claim and earlier 211 claims is that [REDACTED] claim is one of the first brought since the NRC provided notice in the Federal Register of a final rulemaking clarifying that intentional violations of selected regulations carry criminal sanctions. I took from your statement that criminal sanctions for the [REDACTED] matter should, therefore, not be pursued if its operative facts arose prior to notification in the Federal Register.

Setting aside for the moment numerous legal and policy reasons for not seeking to impose criminal sanctions for the vast majority of 211 cases, one purpose of this letter is to make sure you realize that the operative facts associated with [REDACTED] termination occurred in January and February, 1992, whereas the rulemaking notice was published in the Federal Register on November 24, 1992, with an effective date of December 24, 1992. 57 FR 55062.

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The notice stated specifically that criminal sanctions would not be retroactively applied, however, it also indicated that criminal sanctions could still be imposed for previous violations of those "regulations for which appropriate notice was provided." 57 FR 55064-65. Although 10 CFR § 50.7 is nominally included in that category of regulations, I believe it is wrong to base a criminal indictment solely on the 1990 amendments to 10 CFR Part 50 which failed to even vaguely suggest that a violation could result in criminal penalties. 55 FR 10404. In both the proposed rule, (57 FR 223-24), and the final rule (57 FR 55062), NRC recognized that the previous method of providing "notice" of criminality simply by indicating that the particular regulation was promulgated under § 161 b, 1, or c of the Act was inherently faulty.^{2/}

In closing I would like to make two points. First, I feel that it is important for us to come to an understanding as to the point you made in Phoenix, its relation to the facts in the [REDACTED] case pending in Houston, and the fairness of basing a criminal indictment on inadequate notice. For this reason, could you please take a few moments to resolve this apparent confusion and also assure that appropriate personnel within the Department of Justice receive a copy of this letter. I thank you in advance for your serious consideration of this matter and look forward to your reply. Second, as I noted at the outset, aside from the specific legal deficiencies in the Houston proceeding or any other case, the criminalization of this complex employment issue is ill advised. Some of the policy considerations that militate against criminalization are set forth in a letter from our firm to the NRC's Inspector General of April 8, 1993 (copy enclosed). Of course, I would be happy to meet with you and

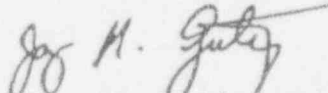
^{2/} Enclosed for your information is a letter to the Department of Justice from counsel for Houston Lighting & Power Company, dated September 7, 1993, which spells out in greater detail the deficiencies in the NRC notice process and related legal impediments to criminal prosecution.

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expand on these thoughts. Finally, because this letter and some of its attachments contain personnel information relating to [REDACTED] I request that they be withheld from public disclosure and placement in the NRC Public Document Room pursuant to 10 CFR 2.790(a)(6).

Sincerely yours,


Jay M. Gutierrez

/cja

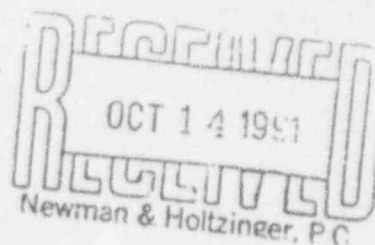
Enclosures

cc: Jim Taylor
Tom Murley
Ben Hayes
Jack Goldberg
Suzanne Black

bcc: J.R.Newman
T.A.Schmutz
W.E.Baer

UNITED STATES
NUCLEAR REGULATORY COMMISSION
OFFICE OF NUCLEAR REACTOR REGULATION
WASHINGTON, D.C. 20555

September 23, 1991



NRC INFORMATION NOTICE 91-59: PROBLEMS WITH ACCESS AUTHORIZATION PROGRAMS

Addressees

All holders of operating licenses or construction permits for nuclear power reactors.

Purpose

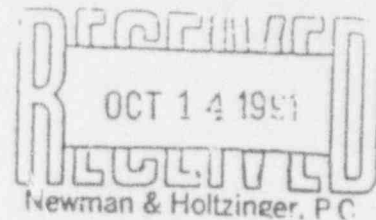
The U.S. Nuclear Regulatory Commission (NRC) is issuing this information notice to alert addressees to two areas of continuing problems with access authorization programs. One area involves licensee contractors or subcontractors not completing the requirements for background investigations or falsifying records; the other involves the improper administration or compromise of psychological tests. It is expected that recipients will review the information for applicability to their facilities and consider actions, as appropriate, to avoid similar problems. However, suggestions contained in this information notice are not NRC requirements; therefore, no specific action or written response is required.

Description of Circumstances

In recent months, the NRC has received numerous reports and allegations that some licensee contractors or subcontractors have certified individuals as satisfactorily meeting the licensee's requirements for background investigations without completing all required residence, employment, education, or reference checks. One contractor certified to a licensee that an employee was suitable for unescorted site access before receiving a response to an investigative inquiry initiated in accordance with the licensee's approved security plan. The contractor subsequently received derogatory information in response to the inquiry that would have led to the denial of access but did not act upon the information. The licensee discovered the information when reviewing the contractor's screening files and immediately suspended the employee's unescorted access. The access was later withdrawn because of the information. This event and similar problems in the past have prompted the licensee to require copies of all contractor and subcontractor background investigations and to perform the adjudication reviews to determine access suitability instead of accepting the contractors' or subcontractors' determinations. Similar screening problems have prompted other licensees to require copies of all derogatory information developed from background investigations conducted by their contractors or subcontractors.

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The NRC has also recently received numerous reports concerning licensee contractors or subcontractors who have provided false certification regarding the length of time individuals had been employed. In one case, a union business agent (BA) certified to a licensee that certain individuals had been members of the union for 3 years and, to the best of the BA's knowledge, had shown no adverse character traits. The certification qualified the individuals for an exemption from background screening requirements as set forth in the licensee's approved security plan because of the BA's personal knowledge of the individuals resulting from the length of union membership. The licensee subsequently discovered that the BA had falsified the certification. None of the individuals had been members of the union for 3 years, and in fact, were not even members of the BA's union local.

Licensees identified some of these problems when auditing contractor or subcontractor programs. One effective audit technique used was telephone contact with the applicant's previous employers and references to verify information supplied by the contractor or subcontractor doing the screening.

In addition to receiving reports of problems with background investigations, the NRC has received allegations that some licensee contractors and subcontractors have improperly administered or deliberately compromised psychological tests, or have falsified the results of such tests. Some of the allegations were similar to cases discussed in IN 88-91, "Improper Administration and Control of Psychological Tests," in that individuals allegedly completed tests in unprocured settings. In one case, an individual allegedly took a psychological test for employment at a nuclear facility in a motel room in which someone called out the "correct" answers to produce the desired profile. It was also alleged that some falsification of test results occurred because contractors exerted pressure on subcontractors to have certain numbers of craft workers certified as acceptable by certain dates for licensees during reactor outages.

Discussion

The NRC has issued IE Circular 78-17, "Inadequate Guard Training/Qualification and Falsified Training Records," October 13, 1978; IE Circular 79-03, "Inadequate Guard Training/Qualification and Falsified Records," February 23, 1979; Information Notice (IN) 82-07, "Inadequate Security Screening Programs," March 16, 1982; IN 83-15, "Falsified Pre-Employment Screening Records," March 23, 1983; IN 87-64, "Conviction for Falsification of Security Training Records," December 22, 1987; IN 88-26, "Falsified Pre-Employment Screening Records," May 16, 1988; and IN 88-91, "Improper Administration and Control of Psychological Tests," November 22, 1988. These documents alerted addressees

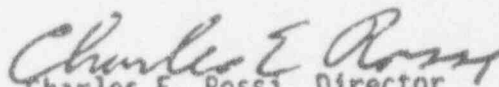
to the possibility that contractors might submit falsified records to meet licensees' commitments to the NRC, identified weaknesses in the administration and control of psychological tests used in personnel screening programs, and reminded licensees of the importance of adequate program audits.

On April 25, 1991, the NRC published Section 73.56 of Title 10 of the Code of Federal Regulations (10 CFR 73.56), "Personnel Access Authorization Requirements for Nuclear Power Plants" (Access Authorization Rule) to provide increased assurance that individuals granted unescorted access to protected and vital areas are trustworthy and reliable and do not pose a threat to commit radiological sabotage. Under the provisions of 10 CFR 73.56(a)(4), licensees may accept an access authorization program, or part of a program, used by its contractors or vendors for their employees provided it meets the rule requirements. Clear specification of screening requirements in the work contract is an effective method to safeguard against inadequate access authorization programs. Under the provisions of 10 CFR 73.56(g)(2), each licensee who accepts the access authorization program of a contractor or vendor must audit the program every 12 months to ensure that the requirements of the Access Authorization Rule, as specified in their approved security plan, are met. Some licensees have committed to ensuring nuclear security expertise on their audit and assessment teams.

Failure to ensure that a proper access authorization program is conducted could compromise nuclear safety. The NRC can take enforcement action in cases in which licensees fail, whether intentionally or unintentionally, to meet security program plan commitments regarding their access authorization program. Furthermore, intentional violations may subject corporations, the individual wrongdoer, and others who knew and condoned such acts to criminal prosecution. In IN 85-97, "Jail Term For Former Contractor Employee Who Intentionally Falsified Welding Inspection Records," IN 86-54, "Criminal Prosecution of a Former Radiation Safety Officer Who Willfully Directed an Unqualified Individual to Perform Radiography," and IN 87-64, "Conviction For Falsification of Security Training Records," the NRC stated that the criminal sanctions available may include a fine and/or imprisonment.

On August 15, 1991, a final rule was published regarding misconduct by unlicensed persons (56 FR 40684). This rule amended the Commission's regulations "to put on notice all persons whose actions relate to a licensee's activities subject to NRC regulation, that they may be subject to civil enforcement action for deliberate misconduct" that causes the licensee to be in violation. Periodically informing contractors, sub-contractors, and vendors that they may be subject to criminal prosecution for intentional wrongdoing may also be a deterrent against deliberate compromise of background screening programs.

This information notice requires no specific action or written response. If you have any questions about the information in this notice, please contact the technical contact listed below or the appropriate Office of Nuclear Reactor Regulation project manager.



Charles E. Rossi, Director
Division of Operational Events Assessment
Office of Nuclear Reactor Regulation

Technical contact: Nancy Ervin, NRR
(301) 492-0946

Attachment: List of Recently Issued NRC Information Notices

LIST OF RECENTLY ISSUED
NRC INFORMATION NOTICES

Information Notice No.	Subject	Date of Issuance	Issued to
91-58	Dependency of Offset Disc Butterfly Valve's Operation on Orientation with Respect to Flow	09/20/91	All holders of OLs or CPs or nuclear power reactors.
91-57	Operational Experience on Bus Transfers	09/19/91	All holders of OLs or CPs for nuclear power reactors.
91-56	Potential Radioactive Leakage to Tank Vented to Atmosphere	09/19/91	All holders of OLs or CPs for nuclear power reactors.
91-55	Failures Caused by An Improperly Adjusted Test Link In 4.16 KV General Electric Switchgear	09/16/91	All holders of OLs or CPs for nuclear power reactors.
85-18, Supp. 1	Failures of Undervoltage Output Circuit Boards In the Westinghouse-Designed Solid State Protection System	09/10/91	All holders of OLs or CPs for Westinghouse (W)-designed nuclear power reactors.
91-54	Foreign Experience Regard- ing Boron Dilution	09/06/91	All holders of OLs or CPs for pressurized water reactors (PWRs).
89-90, Supp. 2	Pressurizer Safety Valve Lift Setpoint Shift	09/05/91	All holders of OLs or CPs for nuclear power reactors.
91-53	Failure of Remote Shutdown System Instrumentation Because of Incorrectly Installed Components	09/04/91	All holders of OLs or CPs for nuclear power reactors.

OL = Operating License
CP = Construction Permit