UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION II
101 MARIETTA STREET, N.W., SUITE 2900
ATLANTA, GEORGIA 30323-0199

May 29, 1996

IA 96-029

Mr. Ken McCoy
[Address deleted
under 2.790]

SUBJECT: DEPARTMENT OF LABOR CASE NOS. 91-ERA-001 AND 91-ERA-011

Dear Mr. McCoy:

Enclosed for your information is the Secretary of Labor's (SOL) November 20, 1995 Decision and Remand Order in DOL Case Nos. 91-ERA-001 and 91-ERA-011, Allen L. Mosbaugh v. Georgia Power Co.. Also enclosed is the Notice of Violation issued today to Georgia Power Company (GPC) for violations of 10 CFR 50.7 in this and another discrimination case.

In the enclosed decision, the Secretary of Labor reversed the DOL Administrative Law Judge's earlier Recommended Decision and Order and found that GPC discriminated against Mr. Mosbaugh because he engaged in protected activities. In the decision, the SOL indicates that you were involved in the discriminatory actions in this case.

We note that discrimination found by the Secretary in this case occurred over five years ago, prior to implementation of 10 CFR 50.5, "Deliberate Misconduct", and we recognize that you may not agree with the Secretary's findings. We are, nevertheless, concerned that the discriminatory actions found by the Secretary in this case could have had a chilling effect on other GPC employees, and we, therefore, take this opportunity to reiterate that harassment, intimidation and discrimination against a licensee's employees for their engaging in protected activities is unacceptable. While we are not taking enforcement action against you, you are on notice that 10 CFR 50.7 prohibits discrimination against an employee for engaging in protected activites and 10 CFR 50.5 authorizes the NRC to take enforcement action against unlicensed individuals for deliberate violations of NRC requirements. Persons found to have discriminated in deliberate violation of 10 CFR 50.7 are subject to individual enforcement action.

You are not required to respond to this letter. If you wish to respond, however, you should do so within 30 days of the date of this letter. Any response you submit should not include any personnel privacy, proprietary or safeguards information so that it can be placed in the NRC's Public Document Room (PDR) without redaction. In accordance with 10 CFR 2.790, a copy of this letter, its enclosures and any response you may decide to submit will be placed in the PDR within 45 days of the date of this letter.

If you have any questions on these matters, please contact James Lieberman, Director, Office of Enforcement, at (301)415-2741.

Sincerely,

Stewart D. Ebneter
Regional Administrator

Enclosures:
1. Secretary of Labor Decision and Remand Order, Case No. 91-ERA-1 and 91-ERA-11 dated 11/20/95
2. Letter and Notice of Violation

Distribution w/encl:
PUBLIC
JTaylor, EDO
JMilhoan, DEDR
SEbneter, RII
LChandler, OGC
JGoldberg, OGC
EJulian, SECY
BKeeling, CA
Enforcement Coordinators
RI, RIII, RIV
JLieberman, OE
JGray, OE
OE:EA File (B. Summers, OE) (2)
DRosano, OE
EHayden, OPA
DDandois, OC
LTemper, OC
GCaputo, OI
EJordan, AEOD
LNorton, OIG
DWheeler, NRR
DHood, NRR
RWright, RII
CEvans, RII
BUyrc, RII
KClark, RII
RTrojanowski, RII
CCasto, RII
PSkinner, RII
IMS:RII

NRC Senior Resident Inspector
U.S. Nuclear Regulatory Commission
8805 River Road
Waynesboro, GA 30830

030016

ADock

33PP

TC 5H

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: November 20, 1995
CASE NOS. 91-ERA-1 and 91-ERA-11

IN THE MATTER OF

ALLEN MOSBAUGH,

COMPLAINANT,

v.

GEORGIA POWER COMPANY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND REMAND ORDER

In these consolidated cases arising under the employee protection provision of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (1988),[1/] Complainant, Allen Mosbaugh, alleged that Respondent, Georgia Power Company, violated the ERA when it downgraded his performance evaluation, removed his company car, suspended him with pay, and discharged him. In a Recommended Decision and Order (R. D. and O.), the Administrative Law Judge (ALJ) recommended dismissal of the complaint on the ground that Mosbaugh did not establish that

---

1/ Section 2902 of the Comprehensive National Energy Policy Act of 1992, Pub. L. No. 102-86, 106 Stat. 2776, amended the ERA for claims filed on or after the date of its enactment, October 24, 1992. See Section 2092(i) of Pub. L. No. 102-486. These complaints were filed in 1990 and therefore the 1992 amendments do not apply.

Georgia Power violated the ERA. The ALJ's findings of fact, R. D. and O. at 4 - 32, are well supported by the record and I adopt them. After review of the record, however, I decline to adopt some of the inferences drawn from the facts and relied upon by the ALJ in reaching his recommended decision.[1/] Therefore, I reject the ALJ's recommendation, find that Georgia Power violated the ERA when it discharged Mosbaugh, and remand the complaint to the ALJ for a recommended decision concerning remedies.

BACKGROUND

Mosbaugh was a high level manager for Georgia Power at its Plant Vogtle nuclear power station near Augusta, Georgia. While serving as Acting Assistant General Manager of Plant Support in early 1990, Mosbaugh anonymously reported to the Nuclear Regulatory Commission (NRC) that other plant managers willfully had violated NRC technical standards. T. 140-144; CX 15. As a result, the NRC's Office of Investigation (NRC-OI) began an on-site investigation and questioned several employees. T. 149-150. Mosbaugh observed that senior managers' attitudes toward him changed after the company learned of the NRC-OI investigation. T. 151-158 The plant's General Manager, George Bockhold, told Mosbaugh that "if you can't conform" to company standards, "you need to get out." T. 159, 162. Mosbaugh observed that plant

---

1/ Under any standard of review I am free to evaluate and reject inferences drawn by the ALJ from the facts presented. *See Hedstrom Co. v. NLRB*, 629 F.2d 305, 316 (3d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981) (agency has authority to draw its own inferences from proven facts in the record without deference to the inferences drawn by the ALJ).

employees were afraid to disagree with management's opinions. T. 184-185.

As a member of the Plant Review Board, Mosbaugh spoke out against using an experimental filtration device called a FAVA filter because it did not meet NRC standards. T. 175-181. Mosbaugh filed an extensive, written internal Quality Concern about the company's decision to use the FAVA filter. T. 181, CX 22, and followed up with additional written memoranda concerning it. CX 23, 24. Bockhold took the investigation of Mosbaugh's concern away from the Quality Concerns Coordinator and handled it himself. T. 182-183.

Mosbaugh believed that his notes and recollections about conversations and events were not sufficient proof of the safety violations that he believed occurred. T. 189-190. He read a legal opinion letter advising Georgia Power that surreptitious one-party tape recording was lawful in the State of Georgia. CX 26. As a means to document his safety concerns and any retaliation for expressing them, Mosbaugh began to surreptitiously tape record selected conversations in which he participated. T. 202-205.

In a March 1990 accident, Plant Vogtle lost all electrical power and was unable for a time to keep the back up generator running. The event caused the reactor to heat up unsafely. T. 207-209. Consequently, Georgia Power declared a serious "site area emergency." T. 211.

Prior to restarting the reactor after the emergency, Georgia Power had to assure the NRC in a Confirmation of Action Letter (COAL) that the reactor could resume power operations safely. T. 255-256. Mosbaugh reviewed the COAL that was submitted to the NRC, CX 40, and determined that Georgia Power may have intentionally misstated the reliability of the generators. T. 258-259. He sent a memorandum to Bockhold reporting the problems with the generators' air quality system, T. 263, CX 41, and obtained further data that verified generator failures. T. 265-267. Mosbaugh reported the false statements to his managers. T. 267.

The COAL did not end the matter, however. Mosbaugh reviewed a draft Licensee Event Report (LER) that contained the same false information about the generators as the COAL. T. 268-269. He promptly reported the false information in the draft to responsible managers, but the final LER submitted to the NRC retained the false information. T. 269-270; CX 42. Mosbaugh followed up with another memorandum to Bockhold enclosing the data that showed the falseness of the statements regarding the generators. T. CX 43. Mosbaugh later worked on revisions to correct the false statements in the LER and the COAL. T. 273, 279-280.

At a staff meeting after the site area emergency, a manager made a statement that Mosbaugh interpreted as promoting a lax attitude toward adherence to technical safety requirements if it

would delay the restart of the reactor. T. 213-214. As a result, Mosbaugh began to tape record more of his conversations.

Mosbaugh learned that Tom Greene, the Assistant General Manager whom Mosbaugh had temporarily replaced, was returning from school and would reclaim his position. T. 278-279. Mosbaugh feared for his future in the company because he had no definite assignment since the position he formerly occupied had been abolished. T. 282. When Greene returned, Mosbaugh also was removed from the Plant Review Board. T. 280-281; CX 44.

Mosbaugh filed two additional anonymous complaints with the NRC concerning safety issues at the plant. T. 219-222; CX 35, 36. Mosbaugh also learned that the NRC called senior managers to Washington, D.C. and criticized the attitude at Plant Vogtle as "cowboy, cavalier, and cocky." T. 274-275; *see also* T. 856.

The NRC granted Mosbaugh "confidential alleger" status in June 1990 and sought his cooperation in an investigation concerning the company's intentional submission of material false information. T. 286-287; CX 45. An NRC-OI investigator later asked Mosbaugh to wear a concealed tape recorder onto the Plant Vogtle site. T. 304-305. Mosbaugh did not reveal that he had made such tape recordings on his own, T. 289-290, 304, and eventually declined the request.

Mosbaugh learned that the NRC would conduct a rare Special Safety Inspection at the plant. T. 297. Bockhold intentionally did not invite Mosbaugh to a meeting of the plant managers concerning how to prepare for the inspection. T. 299, 670-671.

Mosbaugh later overheard Vice President Ken McCoy state that the special inspection occurred "because of some immature behavior on the part of an employee or employee alleger." T. 299.

In the midst of the two week special inspection, Mosbaugh received a mid-year performance rating of "average" that was the lowest overall rating he had ever received at Georgia Power. T. 301-302; CX 48. The appraisal listed improving communications as a goal for Mosbaugh to achieve. CX 48.

Mosbaugh was selected to attend school to receive a Senior Reactor Operator license ("SRO school") and learned that he was not entitled to keep his company car while attending SRO school. RX 32.

At a pre-hearing deposition taken by Georgia Power in an earlier ERA case, Mosbaugh revealed that he had filed several confidential allegations with the NRC and also revealed the existence of his tape recordings. T. 308-309. The same day, Mosbaugh joined a former Georgia Power employee in a petition to the NRC seeking review of the transfer of certain management functions concerning Plant Vogtle to a new entity, Southern Nuclear Power Company (Southern Nuclear). CX 49.

Vice President McCoy was upset about the tape recording and recommended that Mosbaugh be placed on administrative leave while the company investigated the taping. T. 568-570. Georgia Power's President, A.W. Dahlberg, agreed and suspended Mosbaugh with pay. T. 594. Thirty days later, Georgia Power discharged

Mosbaugh for engaging in surreptitious tape recording at Plant Vogtle. T. 478-479, 581; CX 53, 54.

Mosbaugh filed ERA complaints challenging the lawfulness of the lowered performance appraisal, removal of his company car, suspension, and discharge.

MOTIONS CONCERNING THE RECORD

1. Motions to exceed page limitations in briefs.

Mosbaugh's unopposed motions to exceed the page limitation in his initial brief and in his 1994 supplemental brief are granted and the briefs are accepted as filed.

2. Georgia Power's motion to strike portions of Mosbaugh's brief and reply brief.

Georgia Power asks that I strike portions of Mosbaugh's brief and reply brief because they attempt to introduce evidence that is not part of the record. Since I agree that offers of proof are not evidence (Motion at 3, 8), I shall not rely upon any statements in the offers as evidence.

Mosbaugh attached to his Reply Brief a copy of the February 19, 1993 decision of the NRC's Atomic Safety and Licensing Board (ASLB Decision) that granted Mosbaugh's petition to become a party in the case in which Georgia Power sought authority to transfer its operating license to Southern Nuclear. The ASLB decision was issued after the close of the record, the issuance of the recommended decision, and the transfer of the record to the Secretary.

Under the regulations governing proceedings before Department of Labor administrative law judges, a party may seek

authority to supplement the record with newly discovered evidence that was not readily available prior to the close of the record. 18 C.F.R. § 18.54(c). I will treat Mosbaugh's reference to the ASLB decision as a request to supplement the record with the decision.

The ASLB decision is a relevant public document that became available only after the close of the hearing and the transfer of the record to me. Although I do not consider the ASLB decision critical to my decision in this case and I have not relied upon it, I will, in the interest of a complete record, admit the ASLB decision into the record for whatever probative value it may have. See 5 U.S.C. 557(B) (1988): "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."

3. Letters from NRC Chairman to Secretary of Labor and to Senator Baucus.

In response to an inquiry from the Senate Committee on Environment and Public Works, the NRC's Chairman wrote a letter to the committee's Chairman, Max Baucus, giving the NRC's views "whether one-party taping of conversations by employees of NRC licensees could constitute, in some circumstances, protected activity under section 211 of the Energy Reorganization Act of 1974." Pursuant to Baucus' suggestion, the NRC Chairman provided a copy of his views to the Secretary of Labor and served a copy on the parties to this proceeding. Although I have not relied upon the views of the NRC Chairman in reaching a decision on

Mosbaugh's complaint, the July 14, 1993 letters from the NRC Chairman to Senator Baucus and to the Secretary of Labor are admitted into the record in this case for whatever probative value they may have.

4. NRC-OI Memorandum and Report of Investigation.

Mosbaugh seeks to admit into the record the December 17, 1993 NRC-OI Report of Investigation entitled "Vogtle Electric Generating Plant: Alleged False Statements Regarding Test Results on Emergency Diesel Generators," and a December 20, 1993 memorandum from the Director of the NRC-OI concerning that report. The report and memorandum refer to investigation of safety concerns that Mosbaugh brought to the NRC's attention. Georgia Power opposes their admission.

Pursuant to a memorandum of understanding, the Department of Labor has agreed to administer its responsibilities under the ERA's employee protection provision with maximum cooperation and "timely exchange of information in areas of mutual interest" with the NRC. Memorandum of Understanding Between NRC and Department of Labor, Employee Protection, 47 Fed. Reg. 54585 (Dec. 3, 1982). To that end, copies of both recommended and final decisions in ERA cases are provided to the NRC to aid in its responsibility to ensure the safety of nuclear power installations.

Since the memorandum and NRC-OI report were issued in 1993, they were not readily available prior to the 1992 hearing. In view of the NRC's responsibility concerning nuclear safety and the unavailability of the documents prior to the close of the

hearing, I will admit into the record the December 17, 1993 NRC-OI report and the December 20, 1993 memorandum of the NRC-OI Director concerning that report for whatever probative value they may have, although I have not relied upon the report and memorandum in reaching this decision.

5. Motion to reopen the record, grant a new trial and for other relief.

Mosbaugh sought to reopen the record to obtain the testimony of an NRC-OI investigator Larry Robinson concerning the report discussed above. Subsequently, Mosbaugh moved to reopen the record, grant additional discovery, and for a new trial on the basis of the testimony of Joseph Farley, former Executive Vice President - Nuclear of Southern Company and Southern Company Services, at the ASLB proceeding concerning transfer of the license for Plant Vogtle to Southern Nuclear. Farley's testimony purportedly reveals that Farley communicated animus against Mosbaugh to Georgia Power president Dahlberg, who made the decisions to suspend and discharge Mosbaugh. Georgia Power opposes the motions.

In light of the disposition of this complaint in Mosbaugh's favor, there is no reason to remand to the ALJ for the purpose of reopening the record to permit Mosbaugh to conduct additional discovery and adduce additional testimony. Accordingly, the motions are denied.

In connection with this motion, Mosbaugh requested leave to file a reply to Respondent's Brief in Opposition to Complainant's Motion to Reopen the Record, etc. Georgia Power opposed the

request. In the interest of a complete record of pleadings, Mosbaugh's motion for leave to file a reply is granted and the reply is accepted into the record, as is Georgia Power's Brief in Opposition to Complainant's Motion to File a Reply.

DISCUSSION

Where a respondent has introduced evidence to rebut a *prima facie* case of a violation of the ERA's employee protection provision, it is unnecessary to examine the question of whether the complainant established a *prima facie* case. *See Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Final Dec. and Order, Feb. 15, 1995, slip op. at 11 and n.9, petition for review docketed, No. 95-1729 (8th Cir. Mar. 27, 1995). "The [trier of fact] has before it all the evidence it needs to determine whether 'the defendant intentionally discriminated against the plaintiff.'" *USPS Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) quoting *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Thus, the question is whether Mosbaugh proved by a preponderance of the evidence that Georgia Power discriminated against him for engaging in protected activity.

There is no dispute that Mosbaugh's complaints to the NRC about nuclear safety issues constituted protected activities under the ERA. Also protected were his internal safety complaints to superiors. *Bechtel Const. Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995). After Mosbaugh made a confidential complaint to the NRC he engaged in secret one-party

tape recording that was legal in the State of Georgia.[1/] Indeed, the NRC later asked Mosbaugh to make such recordings to aid in its investigation of Mosbaugh's allegations concerning management actions at Plant Vogtle. Georgia Power argues that even though the tape recording was legal, its effect was so detrimental to open communication that Mosbaugh's discharge was appropriate.

The Secretary previously has found that "assisting the government by . . . secret tape recording of conversations concerning alleged illegal dumping practices" constituted protected activity under the employee protection provision of the Solid Waste Disposal Act, 42 U.S.C. 6971. *Haney v. North American Car Corp.*, Case No. 81-SDWA-1, Sec. Dec., June 30, 1982, slip op. at 4. Here, Mosbaugh's recordings clearly supported his complaints to the NRC concerning management actions at Plant Vogtle.

The ALJ stated that even if Mosbaugh's tape recording constituted protected activity at the outset, its duration and scope "became so egregious and potentially disruptive to the workplace that it lost any protected status it may have once possessed." R. D. and O. at 35. The ALJ opined that after the

---

1/ Contrary to Respondents' argument (Resp. Brief at 25), I find that Mosbaugh's lawful tape recording is not analogous to the situation in *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Dec. and Final Ord., Apr. 25, 1983. In that case, the employer fired an employee who violated the company's explicit instruction when he took confidential personnel files from the company vault and placed them in his truck. *Dartey*, slip op. at 10. The Secretary found in that case that misappropriation of confidential company records was a lawful reason to suspend or discharge an employee. *Id.* at 12.

NRC was engaged in investigating Mosbaugh's three complaints, there was no reasonable or appropriate reason for Mosbaugh to continue tape recording his conversations at Plant Vogtle. *Id.*

The NRC, however, asked Mosbaugh to make secret recordings during the period in which the ALJ found that Mosbaugh's taping constituted egregious, disruptive behavior. No one discovered that Mosbaugh made the tapes until he revealed their existence, and therefore I question whether his behavior can be called disruptive.

I disagree that the duration and scope of the recording removed it from being a protected activity. I find that Mosbaugh engaged in protected activity under the ERA by making lawful tape recordings that constituted evidence gathering in support of a nuclear safety complaint. Mosbaugh's tape recording is analogous to other evidence gathering activities that are protected under employee protection provisions, such as making notes and taking photographs that document environmental or safety complaints. *See, e.g., Adams v. Costal Production Operations, Inc.*, Case No. 89-ERA-3, Dec. and Order of Remand, Aug. 5, 1992, slip op at 9 and n.4 (photographing oil spill constituted protected activity).

Georgia Power attempts to justify the discharge on the ground that Mosbaugh could not be an effective manager once other employees learned of his tape recording. The company argues that the employees would not likely engage in free and frank communication with Mosbaugh because of fear of being taped.

According to Georgia Power, open communication among employees is critical in a nuclear plant.

I reject Georgia Power's argument for several reasons. It was Georgia Power that revealed the existence of the tape recordings in a general announcement to all employees and also conducted staff meetings to discuss the taping. T. 679; RX 22. Mosbaugh sought no publicity, kept the tapes in a locked safe, and gave the tapes only to the NRC. Moreover, he only revealed the tapes' existence in response to a question at a sworn deposition taken by Georgia Power.

Further, other employees' potential unwillingness to communicate with Mosbaugh is not dispositive. Dahlberg testified that the company would not have fired Mosbaugh if he had made the secret recordings at the request of the NRC.[1/] T. 428. But the chilling of open communication would be the same even if the NRC had directed Mosbaugh's secret taping. Further, if Mosbaugh were simply known as a whistleblower and not as a recorder of conversations, the chilling effect would be the same. I therefore find that other employees' potential unwillingness to communicate with Mosbaugh was not a legitimate reason for discharging him.

1/ Dahlberg distinguished Mosbaugh's tape recording from the case of a Georgia Power accountant who, at the request of the Internal Revenue Service, secretly tape recorded conversations related to the IRS' criminal investigation into certain Georgia Power accounting practices. T. 469-471; see CX 84. Since the NRC asked Mosbaugh to do the kind of tape recording that he did on his own, however, I do not agree that there is a significant distinction between the two situations.

Georgia Power's president admitted that he suspended and discharged Mosbaugh solely because of his tape recording. R. D. and O. at 36. Therefore, the company admittedly fired Mosbaugh for engaging in activity that was legal and in furtherance of protected activity. Thus, Georgia Power has admitted to a violation of the ERA employee protection provision.

I will turn now to another adverse action about which Mosbaugh complained, his "average" interim performance rating in August 1990. Both Bockhold and McCoy testified that Mosbaugh needed to improve his communication skills and teamwork, particularly in coordinating with his counterpart, the Assistant Plant Manager for Operations, Skip Kitchens. T. 527, 640. One of Mosbaugh's subordinates, Richard Mansfield, agreed that Mosbaugh was ineffective in working with other departments. T. 845. Moreover, Mosbaugh's performance rating for 1989 similarly mentioned the goals of improving "organizational synergy" and improving relations with Kitchens to better than "peaceful coexistence." CX 8. Since Mosbaugh introduced no testimony to overcome the various witnesses' assessments of his need to improve coordination and communication with other departments, I find that the average rating was given for permissible reasons and did not violate the ERA.

Mosbaugh also complained about the removal of his company car. Georgia Power explained that it provided Mosbaugh with a car to use for company business when his position required him to go to the plant at unusual hours. T. 566-567. McCoy testified

that the company removed the car when Mosbaugh was assigned to SRO school because he no longer would need to go to the plant at unusual hours. T. 567. Although Tom Greene kept his car while attending SRO school, McCoy explained that Greene's car was part of his compensation as a higher level employee than Mosbaugh. *Id.* The record reveals that other employees with status equal to Mosbaugh's similarly lost their company cars while attending SRO school. *Id.* I find that Mosbaugh did not overcome the evidence that removal of the car was proper under company policy.

REMEDIES

A successful complainant under the ERA is entitled to reinstatement and back pay. 42 U.S.C. § 5851(b)(2)(B)(ii). Accordingly, I will order Georgia Power to reinstate Mosbaugh to the position he occupied when he was discharged, or an equivalent position with the same terms, conditions, and privileges of employment.

Mosbaugh is entitled to back pay from the date of discharge until reinstatement, less any interim earnings. *Sprague v. American Nuclear Resources, Inc.*, Case No. 92-ERA-37, Sec. Dec. and Ord., Dec. 1, 1994, slip op. at 12. He also is entitled to interest on the back pay amount, at the rate specified for underpayment of Federal income tax. 26 U.S.C. § 6621. *Blackburn v. Metric Constructors, Inc.*, Case No. 86-ERA-4, Dec. and Order on Damages, Oct. 30, 1991, slip op. at 18-19, *aff'd in relevant part and rev'd on other grounds, Blackburn v. Martin*, 982 F.2d 125 (4th Cir. 1992).

Although the record reflects Mosbaugh's monthly salary at the time of discharge, CX 55, there has been no calculation of the exact amount of back pay owed. For example, Mosbaugh is entitled to salary increases that reasonably would have occurred in the five years since his discharge. Accordingly, I will remand to the ALJ for any further proceedings he deems necessary in this regard and for a recommended decision setting forth the amount of back pay.

Mosbaugh also received various employee benefits. See CX 56 and 57. He is entitled to repayment of benefits that Georgia Power would have provided to him from the date of discharge to reinstatement.

The ERA also authorizes compensatory damages for a complainant's pain and suffering. 52 U.S.C. § 5851(b)(2)(b)(ii) (1988). To recover compensatory damages, Mosbaugh had "to show that he experienced mental and emotional distress and that the wrongful discharge caused the mental and emotional distress." *Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992), *citing Carey v. Piphus*, 435 U.S. 247, 263-64 and n.20 (1978).

Mosbaugh testified that his professional reputation was destroyed by the discharge and that in one and a half years between his discharge and the hearing, he was unable to obtain any employment despite documented efforts to find a position at nuclear facilities that he knew were hiring. T. 322-324; see CX 58 through 75. Mosbaugh reported that he experienced, stress, headaches, family problems, and feeling "bad" about not finding

another position. T. 323. He testified that additional stress occurred because he had to use the funds set aside for his children's college education to pay his legal expenses. *Id.*

The very fact of being discharged in violation of the ERA may have a serious emotional impact on a complainant. *Blackburn*, 982 F.2d at 132. Although a complainant may support his claim of pain and suffering with the testimony of medical and psychiatric experts, it is not required. *Thomas v. Arizona Public Service Co.*, Case No. 89-ERA-19, Final Dec. and Order, Sept. 17, 1993, slip op. at 27-28; *Busche v. Burkee*, 649 F.2d 509, 515 n.12 (7th Cir.), *cert. denied*, 454 U.S. 897 (1981). Mosbaugh is entitled to some compensatory damages based on the existing record, which demonstrates his anguish over losing his job and remaining unemployed for a lengthy time.

Mosbaugh attempted to introduce the testimony of an expert witness, Dr. Donald Soeken. In lieu of permitting Soeken's testimony, the ALJ accepted into the record a written offer of proof concerning the expert's expected testimony. T. 322, 946. Soeken, a social worker who regularly counseled whistleblowers, interviewed Mosbaugh and Mosbaugh's wife and would have testified to the stress and financial difficulties that the discharge caused Mosbaugh and his family. *See* Soeken offer of proof submitted to the record on March 18, 1992.

On remand, the ALJ shall permit the examination and cross-examination of Dr. Soeken concerning stress, emotional distress,

and related subjects, and shall recommend the amount of compensatory damages to which Mosbaugh is entitled.

Mosbaugh also is entitled to payment of his attorney's fees and costs. Since the record does not contain any statement of costs and attorney's fees, on remand Mosbaugh may submit a detailed petition and Georgia Power shall be afforded the opportunity to respond. In view of the ALJ's recommended decision dismissing the complaint, I consider the attorney's fees and costs associated with Mosbaugh's various requests to reopen and supplement the record to have been reasonably incurred in bringing the complaint, *see* 42 U.S.C. § 5851(b)(2)(b), even though I have denied some of the requests as unnecessary in light of the disposition of the case.

ORDER

1. Georgia Power shall immediately offer Mosbaugh reinstatement to the same position he occupied at the time of discharge, or a substantially similar position, with the same terms, conditions, and privileges of employment.

2. The case is REMANDED to the ALJ for any necessary supplemental proceedings consistent with this decision and a supplemental recommended decision on the amount of back pay, benefits and compensatory damages to which Mosbaugh is entitled. The amount of back pay and benefits owed shall be subject to interest at the rate specified in 26 U.S.C. § 6621.

3. The ALJ shall afford Mosbaugh the opportunity to submit a detailed petition setting forth his costs and attorney's fees,

and shall afford Georgia Power the opportunity to respond. In the recommended supplemental decision, the ALJ shall set forth the amount of costs and attorney's fees to which Mosbaugh is entitled, consistent with this decision.

SO ORDERED.

Robert B. Reich
Secretary of Labor

Washington, D.C.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION II
101 MARIETTA STREET, N.W., SUITE 2900
ATLANTA, GEORGIA 30323-0199

May 29, 1996

EA 95-171 and EA 95-277

Georgia Power Company
ATTN: Mr. W. George Hairston, III
Executive Vice President
Post Office Box 1295
Birmingham, Alabama 35201

SUBJECT: NOTICE OF VIOLATION
(DEPARTMENT OF LABOR CASE NOS. 90-ERA-30, 91-ERA-001, AND 91-ERA-011)

Dear Mr. Hairston:

On August 4, 1995, the Secretary of Labor issued a Decision and Remand Order in Department of Labor (DOL) Case No. 90-ERA-30, Marvin B. Hobby v. Georgia Power Company. The Secretary of Labor found that, in 1990, senior managers of Georgia Power Company (GPC or licensee) discriminated against Mr. Hobby, former General Manager of GPC's Nuclear Operations Contract Administration (NOCA), when Mr. Hobby's position was eliminated and he was forced to resign from GPC. In addition, the Secretary of Labor found that other acts of discrimination occurred such as relocation of Mr. Hobby's office, restrictions on his access to the building, and revocation of his executive parking privileges. The Secretary of Labor determined that GPC terminated Mr. Hobby for engaging in protected activities, which included his raising safety concerns related to the operation of the Vogtle Electric Generating Plant in an April 27, 1989 memorandum that Mr. Hobby provided to GPC's Vice President of Bulk Power. In the memo and during meetings, Mr. Hobby expressed concerns that the actual organizational structure governing operation of the licensee's nuclear facilities violated NRC requirements. This Decision and Remand Order rejected the Department of Labor's Administrative Law Judge's Recommended Decision and Order issued on November 8, 1991, which found that actions taken against Mr. Hobby were not motivated by his engaging in protected activity. Our concerns regarding the apparent violation of NRC requirements and a copy of the Secretary of Labor's Decision and Remand Order were transmitted to you by letter dated September 1, 1995.

A predecisional enforcement conference regarding this matter was conducted in the Region II office on October 4, 1995, to discuss the apparent violation, the root cause, and your corrective actions to preclude recurrence. This conference was open for public observation in accordance with Section V of the NRC Enforcement Policy, NUREG-1600. A report summarizing the conference was sent to you by letter dated October 11, 1995.

By Decision and Remand Order, dated November 20, 1995, in DOL Case Nos. 91-ERA-001 and 91-ERA-011, Allen L. Mosbaugh v. Georgia Power Company, the

Secretary of Labor concluded that GPC discriminated against Mr. Mosbaugh when GPC terminated him. In his decision, the Secretary of Labor concluded that Mr. Mosbaugh had engaged in protected activity "by making lawful tape recordings that constituted evidence gathering in support of a nuclear complaint" and that other employees' potential unwillingness to communicate with Mr. Mosbaugh was not a legitimate reason for discharging him. This Decision and Remand Order rejected the DOL Administrative Law Judge's Recommended Decision and Order issued on October 30, 1992, which found that Mr. Mosbaugh did not establish that GPC violated the Energy Reorganization Act. A copy of the Secretary of Labor's decision was sent to you under separate cover on December 12, 1995.

On December 11, 1995, during a telephone conversation between you and Messrs. Ellis Merschoff and Bruno Uryc of my staff concerning Mr. Mosbaugh's case, you advised that a predecisional enforcement conference was not required at that time. On December 12, 1995, a letter was sent to you requesting that you provide an explanation of your views on the apparent violation, its root causes, and a description of planned corrective actions. In addition, you were given an opportunity to point out any disagreement with the facts and/or findings presented in the Secretary of Labor's decision. You also were asked to address the potential chilling effect that Mr. Mosbaugh's termination may have had on other employees. On December 13, 1995, GPC filed a Motion to Reopen the Record and for Further Hearings with DOL in this case[1]. In your December 21, 1995 response to the NRC's December 12 letter, you requested that the NRC allow GPC to defer its response to the apparent violation until its Motion to Reopen is ruled upon. After review of GPC's Motion to Reopen and the December 21, 1995 request, the NRC concluded that deferral of the response to the apparent violation was not warranted. By letter dated January 12, 1996, the NRC requested that you provide a full response to the apparent violation and potential chilling effect by January 19, 1996. Your response of January 19, 1996 denied the apparent violation and addressed the potential chilling effect associated with the Secretary of Labor's findings.

Based on the Decision and Remand Orders issued by the Secretary of Labor, the

---

[1] We note that, in the Motion to Reopen, GPC has argued that Mr. Mosbaugh deliberately violated NRC requirements and that, as a consequence, pursuant to Section 211(g) of the Energy Reorganization Act, the protections of section 211 do not apply to Mr. Mosbaugh. The NRC recognizes that it found that Mr. Mosbaugh was involved in some of the performance failures that resulted in the submittal of inaccurate or incomplete information to the NRC -- see Modified Notice of Violation C.3 (EA 93-304, NRC letter dated March 13, 1995): " . . . the Acting Assistant General Manager - Plant Support, the General Manager for Plant Support, and the Technical Support Manager failed to clarify and verify the starting point of the successful consecutive DG starts reported in the April 19, 1990 LER . . . ." However, the NRC did not there find that Mr. Mosbaugh deliberately violated any requirement. It is the NRC's view that, but for Mr. Mosbaugh's activities in raising concerns and taping meetings and conversations among GPC personnel, the evidence to support the enforcement actions with regard to GPC's submittals of inaccurate and incomplete information would not have been obtained.

violations involve the failure to adhere to the requirements of 10 CFR 50.7, Employee Protection, which prohibits discrimination against employees engaging in protected activities. During the predecisional enforcement conference and in your letter of January 19, 1996, GPC denied the violations involving Messrs. Hobby and Mosbaugh. Despite those denials, it is our view, based on the Secretary of Labor's decisions, that the facts support the conclusion that GPC violated the regulations applicable to employee protection as stated above. Therefore, the NRC adopts the Secretary of Labor's decisions in these cases and finds that the actions taken against Messrs. Hobby and Mosbaugh were acts of discrimination for their having engaged in protected activities.

These violations are of very significant regulatory concern because they involved acts of discrimination by senior corporate management. The NRC places a high value on the freedom provided to nuclear industry employees to raise potential safety concerns to licensee management or to the NRC. Section 210 (now 211) of the Energy Reorganization Act and 10 CFR 50.7 establish strict requirements for the protection of employees against discrimination for raising nuclear safety issues and the NRC Enforcement Policy calls for significant enforcement action in cases where senior corporate management violate these requirements. Therefore, these violations have been categorized in accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions" (Enforcement Policy), NUREG-1600, at Severity Level I.

In accordance with the Enforcement Policy, a base civil penalty in the amount of $100,000 is considered for Severity Level I violations. Because the Statute of Limitations for imposing a civil penalty has expired, no civil penalty is being proposed for the violations. Had the Statute of Limitations not expired, we would have considered the circumstances surrounding these matters, including corrective actions and efforts to avoid a chilling effect, to determine whether to impose civil penalties to the full extent of NRC's statutory authority in these cases.

To emphasize the importance of ensuring that employees who raise real or perceived safety concerns are not subject to discrimination for raising those concerns and that every effort is made to provide an environment in which all employees may freely identify safety issues without fear of retaliation, harassment, intimidation, or discrimination, I have been authorized, after consultation with the Commission, to issue the enclosed Notice which includes two violations, each categorized at Severity Level I.

You are required to respond to the enclosed Notice and should follow the instructions specified in the enclosed Notice when preparing your response. In your response, you should document the specific actions taken and any additional actions you plan to prevent recurrence. Although we recognize that the U.S. District Court for the Northern District of Georgia recently ruled that the Secretary's Order with regard to Mr. Hobby is not final or now immediately enforceable, we are, nevertheless, concerned that your decision in the Hobby and Mosbaugh cases -- that GPC would not immediately reinstate Messrs. Hobby and Mosbaugh as stated in the Decision and Remand Orders of the SOL -- may itself have a chilling effect on other employees. Therefore, in your response to this letter, you should describe any steps you intend to take to ensure that this decision by GPC will not create a chilling effect. After

reviewing your response to the Notice, including any actions you have taken to address the potential chilling effects, and the results of future inspections, the NRC will determine whether further NRC enforcement action is necessary to ensure compliance with NRC regulatory requirements.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter, its enclosure and your response will be placed in the NRC Public Document Room. To the extent possible, your response should not include any personal privacy, proprietary, or safeguards information so that it can be placed in the PDR without redaction.

Sincerely,

Stewart D. Ebneter
Regional Administrator

Docket Nos. 50-424, 50-425
License Nos. NPF-68, NPF-81

Enclosure: Notice of Violation
cc w/encl: (See next page)

cc w/encl:
Mr. C. K. McCoy
Vice President
Vogtle Electric Generating Plant
Georgia Power Company
P. O. Box 1295
Birmingham, AL 35201

J. D. Woodard
Senior Vice President
Georgia Power Company
P. O. Box 1295
Birmingham, AL 35201

J. B. Beasley
General Manager, Plant Vogtle
Georgia Power Company
P. O. Box 1600
Waynesboro, GA 30830

J. A. Bailey
Manager-Licensing
Georgia Power Company
P. O. Box 1295
Birmingham, AL 35201

Nancy G. Cowles, Counsel
Office of the Consumer's
Utility Council
84 Peachtree Street, NW, Suite 201
Atlanta, GA 30303-2318

Office of Planning and Budget
Room 615B
270 Washington Street, SW
Atlanta, GA 30334

Office of the County Commissioner
Burke County Commission
Waynesboro, GA 30830

Harold Reheis, Director
Department of Natural Resources
205 Butler Street, SE, Suite 1252
Atlanta, GA 30334

Thomas Hill, Manager
Radioactive Materials Program
Department of Natural Resources
4244 International Parkway
Suite 114
Atlanta, GA 30354

Attorney General
Law Department
132 Judicial Building
Atlanta, GA 30334

Ernie Toupin
Manager of Nuclear Operations
Oglethorpe Power Corporation
2100 E. Exchange Place
Tucker, GA 30085-1349

Charles A. Patrizia, Esq.
Paul, Hastings, Janofsky & Walker
10th Floor
1299 Pennsylvania Avenue
Washington, D. C. 20004-9500

Distribution w/encl:
PUBLIC
JTaylor, EDO
JMilhoan, DEDR
SEbneter, RII
LChandler, OGC
JGoldberg, OGC
EJulian, SECY
BKeeling, CA
Enforcement Coordinators
RI, RIII, RIV
JLieberman, OE
JGray, OE
OE:EA File (B. Summers, OE) (2)
DRosano, OE
EHayden, OPA
DDandois, OC
LTemper, OC
GCaputo, OI
EJordan, AEOD
LNorton, OIG
DWheeler, NRR
DHood, NRR
RWright, RII
CEvans, RII
BUyrc, RII
KClark, RII
RTrojanowski, RII
CCasto, RII
PSkinner, RII
IMS:RII

NRC Senior Resident Inspector
U.S. Nuclear Regulatory Commission
8805 River Road
Waynesboro, GA 30830

NOTICE OF VIOLATION

Georgia Power Company
Vogtle Electric Generating Plant
Units 1 and 2

Docket Nos. 50-424 and 50-425
License Nos. NPF-68 and NPF-81
EA 95-171 and EA 95-277

As a result of Secretary of Labor decisions dated August 4, 1995 (90-ERA-030) and November 20, 1995 (91-ERA-001 and 91-ERA-011), violations of NRC requirements were identified. In accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions," NUREG-1600, the violations are listed below:

10 CFR 50.7 prohibits discrimination by a Commission licensee against an employee for engaging in certain protected activities. Discrimination includes discharge or other actions relating to the compensation, terms, conditions, and privileges of employment. Protected activities are described in Section 210 (now 211) of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or Energy Reorganization Act.

A. Contrary to the above, in January and February 1990, Georgia Power Company (Licensee) discriminated against Mr. Marvin B. Hobby, then an employee of the Georgia Power Company, as a result of his having engaged in protected activities. The protected activities included Mr. Hobby's expressed concerns that the actual organizational structure governing operation of the Licensee's nuclear facilities violated NRC requirements. The Licensee terminated Mr. Hobby on February 23, 1990 and took other adverse actions as a result of his having engaged in these protected activities. The Secretary of Labor issued a Decision and Remand Order in Department of Labor case 90-ERA-30 on August 4, 1995, which found that Mr. Hobby's discharge as well as his office relocation, the denial of executive parking privileges and loss of access were acts of retaliation for engaging in these protected activities. (01011)

This is a Severity Level I violation (Supplement VII).

B. Contrary to the above, in September and October 1990, the Licensee discriminated against Mr. Allen L. Mosbaugh, then an employee of the Georgia Power Company, as a result of his having engaged in protected activities. The protected activities included making tape recordings that constituted evidence gathering in support of a nuclear complaint. The Secretary of Labor issued a Decision and Remand Order in Department of Labor cases 91-ERA-001 and 91-ERA-011 on November 20, 1995 finding that Mr. Mosbaugh's suspension and discharge were acts of retaliation for engaging in protected activity. (02011)

This is a Severity Level I violation (Supplement VII).

Regulatory Commission, ATTN: Document Control Desk, Washington, D.C. 20555 with a copy to the Regional Administrator, Region II, and a copy to the NRC Resident Inspector at the facility that is the subject of this Notice, within 30 days of the date of the letter transmitting this Notice of Violation (Notice). This reply should be clearly marked as a "Reply to a Notice of Violation" and should include for each violation: (1) the reason for the violation, or, if contested, the basis for disputing the violation, (2) the corrective steps that have been taken and the results achieved, (3) the corrective steps that will be taken to avoid further violations, and (4) the date when full compliance will be achieved. Your response may reference or include previously docketed correspondence if the correspondence adequately addresses the required response. If an adequate reply is not received within the time specified in this Notice, an order or a Demand for Information may be issued as to why the license should not be modified, suspended, or revoked, or why such other action as may be proper should not be taken. Where good cause is shown, consideration will be given to extending the response time.

Under the authority of Section 182 of the Act, 42 U.S.C. 2232, this response shall be submitted under oath or affirmation.

Because your response will be placed in the NRC Public Document Room (PDR), to the extent possible, it should not include any personal privacy, proprietary, or safeguards information so that it can be placed in the PDR without redaction. However, if you find it necessary to include such information, you should clearly indicate the specific information that you desire not to be placed in the PDR, and provide the legal basis to support your request for withholding the information from the public.

Dated at Atlanta, Georgia
this 29th day of May, 1996