

CASE No. 2-95-008

United States
Nuclear Regulatory Commission



Report of Investigation

ST. LUCIE NUCLEAR PLANT:

ALLEGED DISCRIMINATION AGAINST AN INSTRUMENTATION
AND CONTROL TECHNICIAN FOR REPORTING SAFETY CONCERNS

Office of Investigations

Reported by OI: **R11**

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Release

Title: ST. LUCIE NUCLEAR PLANT:

ALLEGED DISCRIMINATION AGAINST INSTRUMENTATION AND CONTROL TECHNICIAN
FOR REPORTING SAFETY CONCERNS

Licensee:

Case No.: 2-95-008

Florida Power and Light Company
P.O. Box 14000
Juno Beach, Florida 33408-0420

Report Date: July 31, 1996

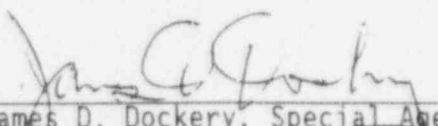
Control Office: OI:RII

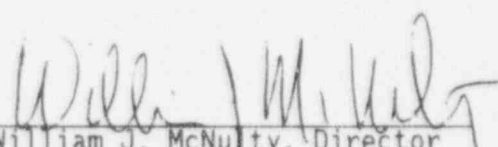
Docket Nos.: 050-335; 050-389

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SYNOPSIS

Based on information developed by the U.S. Nuclear Regulatory Commission (NRC) Office of the Inspector General, the NRC Office of Investigations (OI), on March 3, 1995, initiated an investigation into the allegation that the Florida Power and Light Company (FPL), an NRC licensee, illegally discriminated against a St. Lucie Nuclear Plant instrumentation and control technician because he engaged in activity protected under Section 211 of the Energy Reorganization Act and 10 CFR 50.7.

The OI investigation did not substantiate the allegation that FPL illegally discriminated against the complainant/allegor.

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SYNOPSIS

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DETAILS OF INVESTIGATION

Applicable Regulations

Allegation: Alleged discrimination against an instrumentation and control (I&C) technician for reporting safety concerns

Section 211 - Energy Reorganization Act of 1974, as amended - Employee Protection

10 CFR 50.5 - Deliberate misconduct

10 CFR 50.7 - Employee protection

Purpose of Investigation

This investigation was initiated by the U.S. Nuclear Regulatory Commission (NRC), Office of Investigations (OI), Region II (RII) on March 3, 1995 (Exhibit 1), to determine whether Gary L. PHIPPS, an I&C at the St. Lucie Nuclear Plant (SLNP) was discriminated against by SLNP supervision and management because PHIPPS engaged in activity protected under law.

Background

While being interviewed by the NRC Office of the Inspector General (OIG), PHIPPS mentioned that he felt he was subjected to discrimination by his employer, the Florida Power and Light Company (FPL), an NRC licensee. PHIPPS' allegation was referred by the OIG to the NRC RII allegation coordinator on February 27, 1995. The alleged was contacted by the allegation coordinator and the information he supplied was subsequently referred to OI for investigation. On April 11, 1995, PHIPPS submitted a complaint against FPL (Exhibit 2) to the U.S. Department of Labor (DOL).

Interview of Allegor (Exhibit 3)

PHIPPS was interviewed by OI in Jensen Beach, Florida, on March 8, 1996 (Exhibit 3). The alleged provided the following information.

In June of 1991 PHIPPS claims he engaged in protected activity when he reported a discrepant condition with swagelock tubing fitting while he was employed as an I&C at the FPL Turkey Point Nuclear Plant (Exhibit 2, p. 3). During February 1994 while he was working in SLNP during an outage, PHIPPS engaged in protected activity on two occasions wherein he had conflicts with an I&C supervisor, James KAWA, over plant operating procedures (Exhibit 3, pp. 8-11, 23-24, and 39-42; Exhibit 2, pp. 3-4). In July 1994 PHIPPS reported a concern to the SLNP "SPEAKOUT" program regarding new indicator instrumentation in the SLNP reactor simulator (Exhibit 3, pp. 8, 47-48, and 50; Exhibit 2, p. 4).

In response to OI questions regarding precisely who was responsible for discriminating against him, PHIPPS testified "...management, as a whole, got

together and made the decision (to discriminate against PHIPPS) as a group." PHIPPS does not know when or where this meeting took place nor does he know who attended. As a result of the supposed meeting, it was determined by management in October 1994 that the two reactor simulator I&Cs would not work in the plant during the impending outage (Exhibit 3, pp. 12-14). By virtue of their procedural disagreements during the plant outage in early 1994, PHIPPS asserted that KAWA, a SLNP supervisor, was aware of his engagement in protected activity (Exhibit 3, pp. 7-8). PHIPPS also asserted that the SLNP plant manager knew about his protected activity because PHIPPS had submitted a concern to the "SPEAKOUT" program and "...speak-out does go through the plant manager" (Exhibit 3, p. 8).

According to PHIPPS, the main manifestation of discrimination against him was that (unidentified) "...plant management...tried to segregate [PHIPPS] from normal work activities" (Exhibit 3, pp. 14-17). PHIPPS stated that "...the start of the point of discrimination (against him) was October 26, 1994...when the final decision was made not to work [him] in the plant" during the late-1994 outage (Exhibit 2, p. 4). The decision not to have PHIPPS work in the plant during the outage was not made by an "individual" it was the result of "...a group of people making a decision and something of that nature is a conspiracy." PHIPPS could not identify any specific individual in the group that made the decision (Exhibit 3, pp. 27-28). It was first decided by management that PHIPPS' co-worker (Jim LEWIS), the only other simulator I&C, would work in the plant during the late-1994 outage. However, PHIPPS' manager (Jim MARTIN) felt it was unfair to offer the plant work to only one of the two simulator I&Cs (Exhibit 2, p. 2; Exhibit 3, p. 6). PHIPPS referred the matter to his union representative who took the complaint to the plant manager as a labor contract dispute. The final decision on the issue was that, as required by the union contract, both simulator I&Cs would be afforded the opportunity to work the same amount of overtime as the plant I&Cs doing backlogged simulator maintenance (Exhibit 2, pp. 1-2; Exhibit 3, pp. 7-8 and 35-36). As a result of this arrangement, PHIPPS lost no money by working in the simulator rather than the plant (Exhibit 3, pp. 7-8). PHIPPS did work in the plant for one weekend during the outage when he was requested, by name, to do calibration work on a hydrogen panel (Exhibit 3, pp. 36-37).

SLNP next underwent an outage of "...four months or five months" duration during 1995.

SPECIAL AGENT'S NOTE: During 1995 SLNP was in an outage for 73 days from August 1 until October 12, due to hurricane Erin.

PHIPPS worked in the plant during that outage "full-time." PHIPPS described his experience and relationship with SLNP supervision during the outage to be "absolutely" satisfactory (Exhibit 3, pp. 45-46).

With respect to the simulator instrument indicator concerns PHIPPS raised to the "SPEAKOUT" program, PHIPPS acknowledged that the situation was being adequately addressed by SLNP management (Exhibit 3, pp. 47-49). At the time of the OI interview PHIPPS voiced general satisfaction with his current work situation at SLNP (Exhibit 3, p. 51).

Summary of DOL Activities

PHIPPS' complaint to DOL was investigated by the DOL Wage and Hour Division (W&H). On September 8, 1995, the W&H Assistant Area Director notified PHIPPS' attorney of the W&H "...conclusion that Mr. Phipps engagement in protected activities was a factor in [the licensee's] decision to prohibit him from working in the Instrument and Control Plant's (sic) Fall 1994 Unit 1 and Spring 1995 Unit 2 refueling outages." FPL appealed this decision and the matter was scheduled for a hearing by an Administrative Law Judge (ALJ). Prior to the ALJ proceeding, PHIPPS and FPL entered into a settlement agreement and a stipulation of voluntary dismissal of the complaint was filed with DOL on October 27, 1995.

Coordination with NRC Counsel

The DOL complaint submitted by PHIPPS and his OI interview transcript were reviewed by and discussed with RII legal counsel on June 3, 1996. Based on the content of these documents, Regional Counsel opined that PHIPPS' did not articulate any reasonable evidence that he had been discriminated against by the licensee for engaging in protected activity.

Evidence

On October 6, 1995, based on the DOL W&H decision favoring PHIPPS, the RII Regional Administrator directed FPL to submit a response to the NRC that:

(P)rovides the basis for the employment action regarding [PHIPPS] and includes a copy of any investigative reports that [the licensee has] regarding the circumstances of the action.

On December 11, 1995, the licensee responded under sworn affidavit (Exhibit 4) executed by Jerome H. GOLDBERG, President, FPL Nuclear Division affirming that:

The facts set forth in the [response] are true and accurate to the best of [GOLDBERG's] knowledge, information and belief.

The licensee response (Exhibit 5) by GOLDBERG includes "Concern Investigation Report No. NSS-PSL-95-025" (Appendix B) which documents the licensee's investigation of PHIPPS' allegation of discrimination to the SLNP "SPEAKOUT" program. That investigation did not substantiate PHIPPS' allegation. The licensee asserts that the staffing decisions made by SLNP management which affected PHIPPS were based on the need to most efficiently manage manpower during outages. The licensee also acknowledges that the SLNP I&C department head (L. ROGERS) and an I&C supervisor (KAWA) had personality conflicts with PHIPPS.

Agent's Analysis

The first burden of proof in a complaint under 10 CFR 50.7 requires that the complainant articulate prima facie evidence of a violation of the regulation by a licensee. PHIPPS did not do so.

The licensee concedes that PHIPPS engaged in protected activity during the spring 1994 plant outage and in a July 1994 concern raised to the licensee's "SPEAKOUT" program (Exhibit 5, p. 8).

PHIPPS points to a 1991 incident wherein he "...reported to speak out a discrepant condition with the swagelock tubing fitting installation" on an emergency diesel at the FPL Turkey Point plant as an example that PHIPPS engaged in protective activity. As a result of raising that concern, PHIPPS testified that he was given a letter of commendation and a Cross pen from FPL President GOLDBERG and, eventually, was transferred to a better position at SLNP at his request (Exhibit 2, p. 3; Exhibit 3, pp. 17-19). The only connection made by PHIPPS between his protected activity in 1991 and the alleged discrimination at a different nuclear plant three years later is: "News does travel between nuclear plants" (Exhibit 2, p. 3). There is no reasonable connection drawn by PHIPPS between the events of 1991 and his alleged mistreatment by the licensee in 1994.

It is clear that plant I&C supervisor, KAWA, knew that PHIPPS had disagreed with KAWA over plant procedures on two occasions. Likewise, SLNP "SPEAKOUT" and Human Resources personnel knew that PHIPPS raised a concern on July 26, 1994. PHIPPS alleges that these incidents resulted in a "conspiracy" ranging from first line supervision, through the Human Resources Department, up to the SLNP plant manager to discriminate against him. As evidence of this "conspiracy" PHIPPS cites the fact that the "SPEAKOUT" program answers to the plant manager and the fact that he was not selected to work the fall 1994 or February 1995 SLNP outages. PHIPPS asserts that this agreement was reached among unspecified co-conspirators during a meeting on an unknown date and he infers, with no direct evidence, that the intent of the "conspiracy" was to either punish or thwart his engagement in protected activity (Exhibit 3, p. 27).

PHIPPS does not articulate any evidence to show that KAWA, "SPEAKOUT" or Human Resources personnel, the SLNP plant manager or any supervisor/manager in the overtime decision-making chain were upset, or even cared, about any "protected" issue PHIPPS raised. There is no clear connection established by PHIPPS between his engagement in protected activity and his perceived illegal mistreatment by the licensee (Exhibit 3, pp. 16-17).

PHIPPS admitted that he lost no money as a result of any perceived mistreatment by the licensee (Exhibit 3, pp. 7-8 and 15). He considers "...the fact that they tried to segregate me from normal work activities" to be the main act of discrimination against him. Citing "normal [I&C] activities" PHIPPS refers to working in the plant during an outage (Exhibit 3, pp. 14-15). PHIPPS' "normal work activities" were not in the plant. PHIPPS applied and was selected to work in the SLNP simulator, a position he described as "...the premium job..." at SLNP (Exhibit 3, p. 19). By his own description, I&C work in the plant during an outage can be extremely uncomfortable (Exhibit 3, p. 29) and, during the October 1994 outage he "...didn't lose anything because they made up every single (overtime) hour (working PHIPPS) in the simulator" (Exhibit 3, p. 7). PHIPPS does not articulate any negative or adverse employment consequence at the hands of the licensee as a result of engaging in protected activity.

The licensee's response to the NRC demand for information (Exhibit 5) is a credible refutation of PHIPPS' discrimination complaint. PHIPPS engaged in protected activity at SLNP. SLNP management made business decisions on how to most efficiently utilize I&C manpower during an outage. There is no apparent relationship between these events. If anything, the scenario described in PHIPPS' complaint is a union dispute which SLNP management appears to have handled equitably, to PHIPPS' benefit and within union contract requirements, before PHIPPS ever made the complaint.

Conclusion

The OI investigation did not substantiate the allegation that FPL illegally discriminated against the complainant/allegor, PHIPPS.

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LIST OF EXHIBITS

<u>Exhibit No.</u>	<u>Description</u>
1	Investigative Status Record, dated March 3, 1995.
2	Letter, dated April 11, 1995, from PHIPPS to NRC RII and U.S. Department of Labor.
3	Transcript of OI Interview of PHIPPS, dated March 8, 1996.
4	Affidavit of GOLDBERG, dated December 11, 1995.
5	Enclosure 1 (with appendices) to FPL's response to the NRC request for information related to the DOL complaint of PHIPPS.