LAW OFFICES
MOZART G. RATNER, P. C.
1900 M STREET, N.W.
SUITE 610
MOZART G. RATNER WASHINGTON, D.C. 20036 AREA CODE 202
223-9472

August 27, 1985

Mr. John T. Collins
Special Assistant to the Director
Office of Inspection and Enforcement
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Re: Appropriate Financial Penalty For G.E.
Severity Level I Violation re
Discrimination Against Vera English

Dear Mr. Collins:

After our telephone conversation about the Parks case, EA 84-137, I revisited the NRC Official Enforcement Policy to see what criteria are available for fixing the financial penalty to G.E. for its illegal discrimination against Mrs. English to prevent her from continuing to report, prove and insist upon appropriate remedies for serious management violations.

In the first place, as stated in my letter to you of August 21, 1985 (p. 6), "senior corporate management" at WMD, i. e., Lees and Long (possibly with the knowledge and approval of Vice President Wolfe and with the active participation of Nuclear Division counsel Klion (C-4A, DOL Investigator Lawson's Narrative Report, p. 5, last par., p. 6, par. 4, plotted the fraudulently disguised discrimination against Mrs. English. Although unmentioned by the ALJ, Mr. Lees admitted on deposition before trial (C-1, pp. 35-36), that it was he who had decided to remove Mrs. English from the Chemet Lab and that (id. 42-43) had he known that four of the five charges against her would not stand up on appeal, he would not have removed her from the Chemet Lab. Yet Lees and Long adamantly refused to reinstate her to a job in the Chemet Lab despite this result of the appeal. Lees'admission that the punishment imposed was excessive is alone enough to establish illegal discrimination by "senior corporate management." (I Morris, The Developing Labor Law Second Ed., p. 261, text accompanying n. 484; Mid State Broadcasting, 248 NLRB 1206 1980; 104 1RRM 1024). This, ipso facto, makes G.E.'s offense against Mrs. English a

IE14
1/0

Severity Level I (10 CFR 140, Supp. VII, A, 4), rather than a Severity Level II violation, as was GPU's offense against its subcontractor Bechtel's employee, Parks.

Second, proportionate assessment of "Base Civil Penalties" (10 CFR 133), however appropriate in the Parks case, would be inappropriate in the English case. Thus, the Enforcement Policy recognizes (10 CFR 132, "B. Civil Penalty") that:

> "The deterrent effect of civil penalties is best served when the amounts of such penalties take into account a licensee's 'ability to pay.' In determining the amounts of civil penalties for licensees for whom the tables do not reflect the ability to pay, NRC will consider as necessary an increase or decrease on a case-by-case basis."

Clearly, "the tables do not reflect [G.E.'s] ability to pay." G.E.'s net assets exceed 21 1/2 billion dollars. For a corporation of that wealth, a $25,000 fine would have as little deterrent effect as a parking ticket!

The Act declares, 42 U.S.C. § 2282:

> "If any violation is a continuing one, each day of such violation shall constitute a separate violation for the purpose of computing the applicable civil penalty." (Emphasis added.)

The Policy declares (10 CFR 132):

> "In cases involving willfulness, flagrant NRC-identified violations, repeated poor performance in an area of concern, or serious breakdown in management controls, NRC intends to apply its full enforcement authority where such action is warranted, including issuing appropriate orders and assessing civil penalties for continuing violations on a per day basis, up to the statutory limit of $100,000 [or $25,000] per violation, per day. (Emphasis added.)

The Policy also says (10 CFR 133):

"A greater civil penalty may be imposed if a violation continues for more than a day."

The discrimination found by the ALJ in the English case is the epitome of willfulness. Neither this, nor any of G.E.'s other violations charged by Mrs. English or uncovered by NRC itself, were identified by G.E. Indeed, many were fraudulently concealed from and falsely denied to Region II and NRC. The so-called "breakdown in management controls" was actually the product of a deliberate Company policy and plan to avoid time lost in clean up and repairs to escalate production for profit. See my letter of August 21, 1985. Thus, if G.E.'s offense against Mrs. English was "a continuing one," the statutorily required penalty for "continuing violations on a per day basis, up to the statutory limit of" $25,000 (because G.E. WMD is a nuclear fuel producer, rather than a power reactor), must be applied.

The ALJ in this case explicitly found that "Mrs. English has established a continuing violation" (D. 12, last sentence, third par.), "from December 15, 1983, culminating in her transfer out of the Chemet Lab on March 15, 1984, and her discharge on July 30, 1984" (D. 12, 2nd full par., first sentence, D. 6, second full par., second-fifth sentence). The ALJ also found that she suffered by G.E.'s illegal discrimination, for a period of seven and a half months before her discharge, "humiliation and mental suffering." (D. 18, "5", lines 5-6). For a considerably longer period than that (D. 7, par. 3, third and sixth sentences), she had been humiliated by management's failure "to show serious concern" over the problems she raised "of the defective microwave oven, the workers not using the 'friskers' on leaving controlled areas, * * * the constant failure to clean up contamination at her work station [and the ineffectiveness and incompetence of Rad Safety (Tr. 1020)]." (D. 5, top of page, second sentence to end of par.).

G.E.'s persecution of Mrs. English in reprisal for "her actions in attempting to correct what she considered violations of NRC requirements" (D. 8, par. 4, last two lines, emphasis added), continued through the trial before the ALJ, by means of G.E.'s concoction of fraudulent, pretextual, defenses and its compilation of "a somewhat selective [and misleading] chart" (D. 8, last par., second sentence), of the findings of selected NRC Region II investigative reports (D. 6, footnote 5, and accompanying text, D. 8, first par., last par., through "with

the NRC," p. 9, with D. 8, fifth par., second sentence; p. 9, second full par; p. 9, last par. through second full par. on p. 10). Mrs. English's emotional disablement caused by "frustration * * * over her employer's refusal to give credence [to] her concerns on hazardous practices" (D. 9, first full par.), would last for at least six months after the trial (D. 7, 3rd par., penultimate sentence).

If O.I. or I.E., upon independent examination, confirm the ALJ's conclusion that G.E.'s offense against Mrs. English was a continuing one, both the Act and Enforcement Policy, supra, require that monetary penalties be assessed on a daily basis, at the rate of $25,000 per day, from the date G.E. initiated its efforts, by harassment and humiliation, to drive her from the plant by resignation, transfer and discharge to the date the effects of the discrimination upon Mrs. English are overcome. Mrs. English is still undergoing psychiatric treatment for the emotional injury G.E. inflicted upon her (D. 7, third par; D. 9, second full par.), and the prospect is that she will continue to need such help for at least six more months. We suggest a "continuing violation" period of three years, 1982-1985.

Third, the discrimination against Mrs. English does not stand alone. G.E.'s motive therefor was to prevent exposure and proof of: (1) G.E.'s multiple, often repeated, often continuing, serious, violations of ERA and NRC safety rules and practices; (2) G.E.'s "material false statements" to NRC (10 CFR 140, Supp. VII, A 1, n. 15, and accompanying text) and (3) Region II's illicit "cooperation" with G.E. in covering up, dismissing and degrading the significance of G.E.'s violations. The total number, kind and motive (10 CFR 130, first par., second col.), of G.E.'s violations must be considered together (10 CFR 132, second par., 133, last par, second col.), in the light of G.E.'s incredible wealth (id), to arrive at an appropriate civil penalty adequate to deter G.E. from continuing, or resuming, its illegal modus operandi. The Official Policy says: (10 CFR 133):

> "[T]o focus on the fundamental underlying causes of a problem for which enforcement action appears to be warranted, the cumulative total for all violations which contributed to or were unavoidable consequences of that problem may be based on the amount shown in the table for a problem of that Severity Level, as adjusted. If an evaluation of

> such multiple violations shows that more than one fundamental problem is involved, each of which, if viewed independently, could lead to civil penalty action by itself, then separate civil penalties may be assessed for each such fundamental problem."

In addition to which, of course, all members of management who participated in the conspiracy fraudulently to frame Vera English and in all other willful and material misrepresentation violations, must be removed from WMD and the nuclear industry, for want of "integrity."

It may be asked why Mrs. English is so interested in having civil penalties imposed which are adequate to deter continuing or resumed violations by G.E., when she will not benefit personally financially from such penalties. The short answer is, as the ALJ found, that Mrs. English strongly feels that G.E.'s illegal practices "endanger her health and the health of others" (D. 5, first par., last two sentences) and that Mrs. English's principal object from the outset was "attempting to correct what she considered [serious] violations of NRC requirements" (D. 8, fourth par., emphasis added), to protect "her own safety and the safety of fellow employees" (id., fifth par.).

If Mrs. English is successful in this she will have accomplished her goal -- the goal Congress enacted the statute to encourage whistle-blowers to accomplish -- (§ 210(a)(3)): by initiation and participation in NRC and DOL proceedings and other actions and proceedings "to carry out the [safety, health and quality] purposes of * * * the Atomic Energy Act of 1954, as amended" (emphasis added), and will have vindicated, by proving the effectiveness of, the § 210 private attorney general enforcement scheme.

Very truly yours,

Mozart G. Ratner

MGR/hej

cc: Mr. James M. Taylor
Ms. Jane A. Axelrad
James Lieberman, Esq.
Mr. Roger Fortuna
Mr. William Dircks
Mr. John Davis
Mr. Robert H. Burch
Mr. Guy Cunningham