

March 1, 2021

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)
)
)

Tennessee Valley Authority)
Chattanooga, Tennessee)
_____)

) Docket Nos. EA-20-006, EA-20-007

Notification to the Board

This letter notifies the Atomic Safety and Licensing Board that, on March 1, 2021, the attached Response to the February 9, 2021 Order of the Secretary of the Commission was filed on behalf of Erin Henderson in Docket Number IA-20-009.

Respectfully submitted,

/Electronically signed by Timothy J.V. Walsh/

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March 1, 2021

Annette L. Vietti-Cook
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Subject: Erin Henderson's Response to the February 9, 2021 Order of the Secretary of the Commission

Reference: In the Matter of Erin Henderson, IA-20-009

Dear Ms. Vietti-Cook,

On behalf of Ms. Erin Henderson, I am submitting this letter in response to your February 9, 2021 Order requesting clarification regarding whether the NRC Staff's unilateral rescission of the August 24, 2020 Notice of Violation¹ (the "NOV") issued to Ms. Henderson renders moot Ms. Erin Henderson's Request for Hearing² on the NOV, and whether this matter before the Commission should be terminated.

On August 24, 2020, the NRC Staff issued to Ms. Henderson the NOV alleging that she engaged in deliberate misconduct by filing a formal complaint with her employer Tennessee Valley Authority ("TVA"), which alleged that she was suffering a hostile work environment. This complaint subsequently led to an independent investigation by TVA's Office of General Counsel that substantiated in part Ms. Henderson's complaint. The Staff's NOV claimed that a "nexus" existed between Ms. Henderson's filing the formal complaint and other individuals' alleged protected activity. According to the NOV, Ms. Henderson engaged in deliberate misconduct under 10 C.F.R. § 50.5 when she filed the complaint that triggered the investigation, which allegedly caused TVA to violate 10 C.F.R. § 50.7 (the Commission's employee protection rule).

¹ Notice of Violation to Ms. Erin Henderson, Nuclear Regulatory Office of Investigations Report Nos. 2-2018-033 and 2-2019-015 (Aug. 24, 2020) (ADAMS Accession No. ML20218A584).

² Erin Henderson's Request for Hearing (Sept. 13, 2020) (ADAMS Accession No. ML20259A299).

As Ms. Henderson explained in her Request for a Hearing, there were many flaws with the Staff's NOV. The Staff made the unprecedented and erroneous claim that Ms. Henderson's valid and substantiated complaint was an "adverse action" even though Ms. Henderson did not make the personnel decisions that followed.³ In addition, the NOV constituted dangerous new precedent that could silence victims of harassment and encourage management to turn a blind eye to employee misbehavior, ultimately impacting nuclear safety.⁴ The NOV distorted the employee protection rule by shielding employees' disrespectful and unprofessional workplace behavior from challenge because those employees also had allegedly engaged in protected activity, while exposing victims of that behavior to retribution through NRC enforcement action.⁵ As Ms. Henderson explained, the NOV also personally harmed her by significantly damaging her professional reputation and by threatening future escalated enforcement against her.⁶

The NRC Staff caused further harm to Ms. Henderson's professional reputation when the Staff also issued a press release regarding the matter.⁷ This press release explicitly states in part that the NRC Staff "is issuing a Notice of Violation to the former director of corporate nuclear licensing," Ms. Henderson, because "[t]he NRC *found* that TVA's . . . former director of corporate nuclear licensing *violated the NRC's employee protection rule and engaged in deliberate misconduct. . . .*"⁸ This press release remains, unrevised, on the NRC website today, notwithstanding the fact that the NRC Staff has since unilaterally withdrawn the NOV against Ms. Henderson, based "upon further review of the facts of the case in light of the Commission's decision in CLI-21-3."⁹

Ms. Henderson requested that the Staff issue a press release publicizing the Staff's unilateral rescission of the NOV, but the Staff declined to do so.¹⁰ While issuing a press release in the first place may be consistent with the NRC Staff's guidance that the Staff may "choose" to issue a press release for enforcement actions that it "view[s] as newsworthy,"¹¹ once the Staff made the decision that the NOV was newsworthy it should be obvious that the Staff's unilateral

³ *Id.* at 32–34.

⁴ *Id.* at 1.

⁵ *Id.*

⁶ *Id.* at 28–29.

⁷ NRC Press Release, *NRC Fines TVA More than \$600,000 for Discrimination Violations; Cites Two Managers for Their Roles* (Aug. 25, 2020), <https://www.nrc.gov/reading-rm/doc-collections/news/2020/20-042.pdf>.

⁸ *Id.*

⁹ NRC Staff, *Notification to the Commission* (Jan. 22, 2021) (ADAMS Accession No. ML21022A243).

¹⁰ NRC Staff counsel responded to Ms. Henderson's request for a press release with a statement indicating that the Staff added a notation to Ms. Henderson's NOV that it was rescinded on January 22, 2021. While the NRC Staff had previously removed the NOV from the NRC web page identifying significant enforcement actions, it has maintained a copy of the NOV on the NRC ADAMS public document management system, which is accessible from the NRC website. The notation is a welcome step in the right direction, but hardly sufficient to undo the reputational harm suffered by Ms. Henderson by the (now rescinded) NOV.

¹¹ NRC Enforcement Manual NRC Enforcement Manual, Section 1.2.18.E.

decision to rescind the NOV is equally newsworthy. The Staff should not be permitted to tarnish an individual's professional reputation with an NOV, widely publicize the NOV and increase that reputational harm, but then refuse to equally publicize that the NOV was wrongly issued.

In addition, while the individual violation against Ms. Henderson was unilaterally withdrawn, the NRC Staff has not withdrawn or modified the related violations issued to TVA that implicate Ms. Henderson's actions. In the Appendix to the October 29, 2020 Order issued by the NRC Staff to TVA in Dockets EA-20-006 and EA-20-007, the Staff alleged that Ms. Henderson filed her complaint because of the individuals' protected activity.¹² The Staff also claimed that Ms. Henderson's complaint was an adverse action because it triggered an "investigation [that] is so closely related to a personnel action that it could be a pretext for gathering evidence to retaliate,"¹³ thus implying that Ms. Henderson intentionally filed her complaint as a pretext for retaliation.

It appears that the Staff still plans to pursue claims in the separate adjudicatory proceeding on TVA's Order that Ms. Henderson's complaint was intentional and retaliatory. During an oral argument in that proceeding on February 17, 2021, the Staff alleged, on the record, that "Ms. Henderson . . . with the involvement of some others at TVA, took an action against both of those individuals in *reprisal* for their protect[ed]activity."¹⁴ The Staff also claimed that it expects to prove Ms. Henderson's purported act of reprisal at the TVA hearing.¹⁵

In short, in TVA's proceeding the Staff intends to continue pursuing the same claims that Ms. Henderson filed her complaint as a pretext to retaliate, even though the Staff has acknowledged to the Commission that it cannot demonstrate that Ms. Henderson intended to commit wrongdoing. The Staff has also stated in TVA's proceeding that *Ms. Henderson* violated 10 C.F.R. § 50.7,¹⁶ notwithstanding the Commission's express statement in CLI-21-03 that

¹² TVA Order Appendix, Evaluation and Conclusion at 2 (ADAMS Accession No. ML20297A552) ("[T]he NRC staff determined that the former Sequoyah employee's raising of concerns related to responses to non-cited violations and contacting the ECP are protected activities and were contributing factors to filing the formal complaint."); *see also id.* ("Specifically, the former corporate employee engaged in protected activity by raising concerns of a chilled work environment. After becoming aware of this protected activity, the former Director of CNL filed a formal complaint against the former employee.").

¹³ *Id.* ("The NRC staff determined that filing the formal complaint that triggered an investigation is considered an adverse action in this case. When an investigation is so closely related to a personnel action that it could be a pretext for gathering evidence to retaliate, it is an adverse action.").

¹⁴ Transcript of Tennessee Valley Authority, Oral Argument, Nos. EA-20-006 and EA-20-007 at 76:21-24 (Feb. 17, 2021) (ADAMS Accession No. ML21053A046) (hereinafter "TVA Tr.").

¹⁵ TVA Tr. 77:7.

¹⁶ TVA Tr. 92:4-5 ("she violated 10 CFR 50.7").

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Section 50.7 applies to licensees, an applicant for a license, or a contractor or subcontractor thereof, and *not* an unlicensed individual such as Ms. Henderson.¹⁷

Ms. Henderson is actively pursuing her legal rights in the adjudicatory proceeding on TVA's Order to ensure that the actual facts of this matter are reviewed independently of the NRC Staff.

Ms. Henderson agrees that the NRC Staff's unilateral rescission of her NOV has rendered her Request for Hearing moot, and that this matter before the Commission should be terminated. Nonetheless, Ms. Henderson respectfully requests that the Commission exercise its inherent supervisory authority over the Staff and direct the Staff to issue a press release publicizing that it has withdrawn Ms. Henderson's NOV, and to remove all copies of the NOV (annotated or otherwise) from the NRC website and ADAMS.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Timothy J. V. Walsh". The signature is fluid and cursive, with the first name "Timothy" being the most prominent.

Timothy J. V. Walsh
Counsel for Erin Henderson

¹⁷ *Joseph Shea*, CLI-21-3, 93 NRC __ (Jan. 15, 2021) (slip op. at 13 n. 53) (“The Staff’s decision to base its order on an alleged violation of the Deliberate Misconduct Rule squares with our regulatory and enforcement framework because the Deliberate Misconduct Rule applies directly to individuals, including unlicensed individuals, *whereas the Employee Protection Rule prohibits discrimination by a licensee, an applicant for a license, or a contractor or subcontractor thereof.*”) (emphasis added).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notification to the Board on behalf of Erin Henderson has been served through the E-Filing system in the above-captioned proceeding this 1st day of March, 2021.

/Electronically signed by Timothy J.V. Walsh/

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