PDR

FENOC
FirstEnergy Nuclear Operating Company

Perry Nuclear Power Plant
10 Center Road
Perry, Ohio 44081

John K. Wood
Vice President, Nuclear

440-280-5224
Fax: 440-280-8029

Redacted Copy

February 25, 2000
PY-CEI/NRR-2471L

Director, Office of Enforcement
United States Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738

Perry Nuclear Power Plant
Docket No. 50-440

Subject: Reply and Answer to a Notice of Violation and Proposed Imposition of Civil Penalty - $110,000 (NRC Office of Investigations Report No. 3-98-007)

Dear Sir:

Pursuant to 10 CFR 2.201 and 10 CFR 2.205, enclosed is the Perry Nuclear Power Plant (PNPP) response to the May 20, 1999, Notice of Violation and Proposed Imposition of Civil Penalty - $110,000. The due date for this response was extended until 60 days after transmittal of information requested under the Freedom of Information Act (FOIA). The final FOIA response was transmitted on December 29, 1999.

The FirstEnergy Nuclear Operating Company (FENOC) has carefully analyzed the transcripts and records of the NRC Office of Investigations (OI) inquiry and the NRC staff's review of this matter, as provided through our FOIA request. FENOC reconsidered its position as stated in the March 10, 1999, submittal denying any violation, to see if additional evidence suggested a different outcome. Our analysis, however, has only reconfirmed our belief that no violation of 10 CFR 50.7 occurred, and that denial of the violation is the appropriate course of action.

Nearly three years ago, our Radiation Protection Manager discussed the content of two corporate policies with one of his supervisors while walking on the Perry Plant site. Their interpretation of this counseling discussion differs substantially and remains different to this day. The FENOC management team has used this experience as a learning tool to prevent future conflicts and an opportunity to verify a healthy, open safety-conscious work environment exists at our facilities.

Key points of our response to the violation are summarized below:

1) The evidence clearly shows the Radiation Protection Manager lacked any intent to retaliate or discriminate against the Supervisor for his participation in a protected activity. Instead, the Manager took steps which were appropriate to prevent a possible violation of corporate policies.

2) The documentation of the discussion was not discipline, did not imply any wrongdoing, did not impact the terms and conditions of the Supervisor's employment in any way, and was removed from the Supervisor's file after FENOC management was notified of his desire to have it removed.

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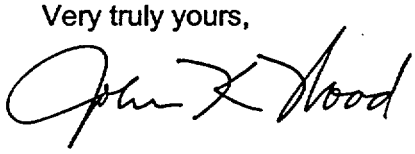
3) While we deny any violation occurred, FENOC recognizes the potential for an issue such as this to affect the work environment. To this end, we have taken significant improvement measures in the nearly three years since the alleged violation occurred. Therefore, this response also describes corrective actions taken and planned to ensure we maintain a healthy, open safety conscious work environment.

Our response to this violation contains two parts. Attachment 1 contains a *Reply to a Notice of Violation*, which includes a summary of the issue, a summary of corrective actions taken, a statement of the facts developed from our investigation and the information provided under FOIA, and legal arguments supporting our position. Attachment 2 contains an *Answer to a Notice of Violation* which requests withdrawal of the violation and remission of the proposed civil penalty. Due to the extensive use of proper names within the text of this response, a redacted copy of the response has been provided as well.

FENOC has reached its conclusion because the facts as known to the Company allow no other result. Nevertheless, we remain committed to finding any possible way to avoid potentially lengthy adjudicatory proceedings. We believe there is a benefit to all in putting this matter to rest rather than involving the regulatory agency, the Company and its employees in a dispute over events now nearly three years old. The Company remains willing to explore any alternative resolution process.

My staff and I look forward to your consideration and response to the issues covered in this letter, so that we can ensure the proper resolution is achieved. If you have questions, please feel free to contact me directly, or call Mr. Gregory A. Dunn, Manager-Regulatory Affairs, at (440) 280-5305.

Very truly yours,



Attachments

cc: Regional Administrator, U. S. Nuclear Regulatory Commission, Region III
NRC Resident Inspector

REPLY TO A NOTICE OF VIOLATION

Restatement of the Violation

From NRC Letter dated May 20, 1999, from J. E. Dyer to Lew W. Myers:

During an NRC investigation completed on December 10, 1998, a violation of NRC requirements was identified. In accordance with NUREG-1600, "General Statement of Policy and Procedure for NRC Enforcement Actions," the NRC proposes to impose a civil penalty pursuant to Section 234 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282, and 10 CFR 2.205. The violation and associated civil penalty is set forth below:

10 CFR 50.7(a), "Employee Protection," in part, prohibits discrimination by a Commission licensee against an employee for engaging in certain protected activities. Discrimination includes discharge and other actions that relate to the compensation, conditions, terms, or privileges of employment. The protected activities are established in Section 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. Protected activities, include but are not limited to, an employee testifying in any Commission proceeding, before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either the Atomic Energy Act or the Energy Reorganization Act of 1974.

Contrary to the above, Centerior Energy Corporation (currently FirstEnergy Nuclear Operating Company) a Commission licensee, through the actions of the Radiation Protection Manager, discriminated against a Radiation Protection Supervisor (RPS), on July 16, 1997, as a result of the Supervisor engaging in protected activities. The RPS's protected activities consisted of participation in a U.S. Department of Labor (DOL) proceeding. Specifically, the Radiation Protection Manager gave the RPS verbal counseling concerning the deposition he was to provide in the DOL proceeding on July 17, 1997, and placed a memorandum documenting the verbal counseling in the RPS's section personnel file on July 22, 1997. (01012)

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

Civil Penalty - $110,000

Reply

FENOC denies this violation.

Summary of Issue

In July 1997, the Radiation Protection Manager (RPM) counseled a Radiation Protection Supervisor (Supervisor) regarding compliance with corporate policies, and subsequently documented the counseling with a memorandum to the Supervisor's section personnel file. The memorandum documenting the counseling was reviewed by the Supervisor, who provided input to the content, and was not entered into the Supervisor's file until several days after the counseling session had taken place.

Several months prior to this meeting between the RPM and the Supervisor, an employee within the Radiation Protection Section had been terminated as a result of performance related issues. That employee then filed an action with the DOL indicating that the termination resulted from raising safety concerns. The Supervisor had been an acquaintance of the terminated employee for

many years, and disagreed with the company's actions. The Supervisor had provided a statement to the DOL in the case raised by the discharged employee.

The day before the Supervisor was to be deposed in the DOL matter involving the former employee, the new RPM, who had been in the position for only about six weeks, was informed by a company attorney that the Supervisor may have been providing company information to the former employee, contrary to corporate policy. The attorney told the RPM to discuss this concern with the Supervisor. The RPM was concerned that confidential information from Radiation Protection Section records may have been released to unauthorized personnel. The RPM determined that two company policies appeared to apply to this situation; Conflict of Interests and Corporate Compliance Program. The RPM discussed these policies with the Supervisor, and documented the discussion in a counseling memorandum several days later.

The RPM believed he was ensuring the Supervisor knew and understood company policies. The RPM was focused on ensuring compliance with the company policies, and was not aware that the Supervisor was scheduled to be deposed the following day. In addition, the RPM did not realize that the pending deposition was a protected activity for the Supervisor as prescribed in 10 CFR 50.7. The RPM's training on the subject of employee protection was limited to the awareness that all employees are free to raise nuclear safety concerns without any fear of reprisal, and this did not prepare the RPM for this situation. The actions taken by the RPM were neither disciplinary nor discriminatory, nor were they intended to be. The RPM has stated, under oath, that the Supervisor was not disciplined. The RPM had a sincere desire to ensure the Supervisor understood what the company policies said, and was interested in the personal well-being of the Supervisor. No employment actions were intended, contemplated, or taken as a result of the involvement of the Supervisor in protected activities, nor have any occurred in the nearly three years that have transpired since the discussion took place. Since the counseling session took place, the Supervisor has testified in both DOL and state civil proceedings on behalf of the terminated employee without any adverse action being taken against him by the company. It is the position of the FirstEnergy Nuclear Operating Company (FENOC[1]) that since there was no intent to discriminate or retaliate, and no employment action was intended, contemplated, or has been taken against the Supervisor, that no violation of 10 CFR 50.7 occurred.

Summary of Corrective Actions Taken and Planned

Regardless of the lack of intent on the part of the RPM, it is clear the Supervisor perceived that the actions taken by the RPM were inappropriate. After the counseling session took place, the Supervisor contacted the NRC, then raised his concern to the Perry ombudsman in a certified letter shortly after the counseling session took place, making clear that the Supervisor believed that he had been harassed and intimidated for his pending participation in a protected activity. (The concern was raised before the counseling memorandum was placed in the Supervisor's file; the initial ombudsman actions were based on what was contained in the letter from the Supervisor to the

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[1] At the time these events took place, the Centerior Energy Corporation acted as owner/operator of the Perry Nuclear Power Plant. Since that time, Centerior Energy Company has merged with the Ohio Edison Company to form FirstEnergy. FENOC, established in 1999, is a wholly owned subsidiary of FirstEnergy and is the operator of the Perry Nuclear Power Plant for FirstEnergy. For ease of reference, FENOC will be used to refer to the licensed operator of the Perry Nuclear Power Plant throughout this document.

ombudsman which did not say anything about a counseling memorandum.) The ombudsman initially determined, on his own, that the counseling was appropriate and no further action was necessary at that time. The ombudsman did not involve additional management in the process, as provided for in the ombudsman procedure. Consequently, the response to the concern raised by the Supervisor was not as timely as desired by the Supervisor, nor as intended by the procedure. The ombudsman eventually reopened his investigation as a result of perseverance by the Supervisor and intervention by senior site management. It was the desire of the Supervisor to have the counseling memorandum removed from his file. Management subsequently decided to have the counseling memorandum removed. During the time that has elapsed since this issue occurred, many additional actions have been taken with respect to the work environment at the Perry plant.

Prior to this issue being raised as a potential enforcement action, a 66-question survey was administered during August and September 1998. The survey was conducted by an unrelated company department and achieved a 72% response rate. One of the objectives of the survey was to establish a benchmark of employee attitudes and opinions in the nuclear organization. The results indicated strong positive opinions about Perry's conservative operating philosophy with respect to safety. The organization that tabulated the survey results noted that the scores reflecting Perry's conservative operating philosophy with respect to safety were high across the organization.

During our initial investigation into this issue, it was identified that the RPM did not have a complete understanding of 10 CFR 50.7 requirements. This has been corrected. In particular, the then Vice President - Perry discussed employee protection requirements with the RPM, and clearly outlined expectations for compliance with the 10 CFR 50.7 requirements. The RPM has read the regulation and participated in familiarization training provided to the salaried employees of the FirstEnergy nuclear plants. As a result of these efforts, the RPM is now familiar with the employee protection requirements. He clearly understands and is sensitive to what activities are protected under the regulations.

As discussed in FENOC's letter dated March 10, 1999, which provided information in lieu of attending a pre-decisional enforcement conference, an assessment of the worker environment at Perry was conducted during February 1999 by a former NRC Regional Administrator. The conclusion of the assessor was that management was doing the right things to encourage and effectively motivate employees to raise safety issues. This assessment provided assurance to the management team that the environment at Perry is positive and there is no chilling effect due to the actions of Perry's management.

On March 24, 1999, the Perry management team met with the plant ombudsman to discuss 10 CFR 50.7, the NRC policy on the safety conscious work environment and reporting safety concerns, and the function of the ombudsman program at Perry. The purpose of the discussion was to enhance sensitivity to the issues of employee protection and employee concerns.

On June 29, 1999, the President of FENOC issued a memorandum to all FENOC personnel at Perry and Davis-Besse discussing NRC employee protection requirements. This memorandum reinforced FENOC management's commitment to ensuring compliance with the regulations. It also stated that managers, supervisors, and co-workers must understand what activities are protected under the regulations and ensure that discrimination towards employees engaged in protected activities does not occur. It listed regulations that provide for these employee protections and discussed NRC Brochure NUREG/BR-0240, Revision 1, "Reporting Safety Concerns." The memorandum was distributed to FENOC employees and was posted on the Perry and Davis-Besse site intranet web pages.

On July 9, 1999, a FENOC Directive was issued entitled, "Employee Concern Resolution." The purpose of the directive was to establish a FENOC policy regarding achieving and maintaining a safety conscious work environment. The directive describes the various means of raising concerns that are available to employees. The policy also states that the company will not tolerate harassment or intimidation of, or discrimination or retaliation against employees who communicate concerns. The policy was distributed to FENOC employees and was posted on the Perry and Davis-Besse site intranet web pages.

In order to re-familiarize FENOC management personnel with the 10 CFR 50.7 requirements, outside legal counsel conducted training for salaried personnel at the nuclear plants then operated by FENOC. These special training sessions were conducted on July 14 and 15, 1999. This training covered many aspects of regulatory responsibilities, whistleblower issues, and employee concerns. A handout was provided which outlined: the regulatory context of the issue, the legal framework, maintaining a safety-conscious work environment, dealing with employee concerns, problem concerns, frequent sources of concerns, and practical guidelines. The purpose of this training was to provide a timely, pointed reminder that employee protection goes beyond simply ensuring that employees can raise safety concerns freely. It was also intended to emphasize FENOC management's commitment to ensuring that a safety conscious work environment exists at FENOC facilities.

On November 9, 1999, the new Vice President - Perry, conducted a meeting for Perry supervisors to emphasize expectations with respect to maintaining a safety conscious work environment. This session reinforced the elements of a good safety conscious work environment and reaffirmed management's expectations regarding the initiation of condition reports. These expectations include maintaining a low threshold for initiation of condition reports. The session also stressed that supervisors must promptly process condition reports, and must help ensure that employees feel free to raise concerns.

In order to strengthen the ombudsman program, a FENOC Employee Concerns Program has been developed and implemented at the FENOC plants. (As of December 1999, the FENOC plants include the Beaver Valley Power Station, as well as the Perry and Davis-Besse plants.) This program is under the leadership of a retired plant ombudsman who reports directly to the President of FENOC. The backbone of the revamped program continues to be the individual site ombudsmen, who report directly to their respective site vice presidents. Each ombudsman has or will receive specialized training in conflict resolution as well as interpersonal communications. A new emphasis has been placed on reaching prompt solutions to concerns and the working relationship with the site vice presidents has been strengthened to help achieve this goal. Additional attributes of this stronger program include refresher training on the Employee Concerns Program as part of general employee training, development of performance indicators and status reports to monitor the results of the program. To make sure the program is performing up to expectations, annual surveys are planned to question employees about the program's effectiveness.

Recognizing the need to ensure employees remain sensitive to maintaining a safety conscious work environment, specific training is being provided to supervisors in addition to the refresher training that is part of the updated Employee Concerns Program. The supervisory continuing training program will incorporate discussion on the requirements of 10 CFR 50.7, with special focus on the supervisor/manager responsibilities. The process for preparing new supervisors and managers will ensure that candidates are familiar with and sensitive to employee protection requirements. Along these same lines, several actions are being taken to ensure members of the FENOC parent company, FirstEnergy, who interface with nuclear site personnel are appropriately sensitized to the requirements of 10 CFR 50.7.

Statement of Facts

A. Employment history of Terminated Radiation Protection Section Employee, Subject of DOL Proceeding

In August 1995, FENOC a Radiation Protection Supervisor (Supervisor) recommended that FENOC hire his friend (Terminated Employee) of thirteen years. [redacted] at p. 7.[2] FENOC hired his friend to complete the formation of a work team at FENOC's Perry Nuclear Power Plant (Perry). This team was under the direct supervision of a Work Team Supervisor. In March 1997, his friend was terminated for performance related issues.

In an Energy Reorganization Act (ERA) complaint filed with the Department of Labor (DOL) shortly after his termination, the Terminated Employee claimed that he was terminated in retaliation for reporting potential safety violations while he was employed at Perry. He also filed a civil action seeking damages for his allegedly wrongful termination.[3] About the same time, the Terminated Employee informed his friend, the Supervisor, that he would like him to be a witness in the two cases. [redacted] at pp. 8-10.

B. FENOC Corporate Counsel's initial lack of interest in the Supervisor's involvement in the terminated employee's DOL proceeding

According to the Supervisor, even before the Terminated Employee had filed his complaint with the DOL, the Supervisor contacted FENOC's Corporate Counsel, to let her know that he would be a witness in the Terminated Employee's matter and offered to discuss his views with her. Corporate Counsel declined and told the Supervisor that she saw no need to speak with him until the Terminated Employee had brought formal charges against the company. [redacted] at p. 9.

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[2] Interviews taken and the report prepared by the NRC Office of Investigations ("OI") are cited as "[redacted] at p. 1" or "Report of Investigation at p. 1." Other documents cited indicate whose testimony is being relied upon and reference the FOIA document (NRC FOIA/PA 99-244) number where applicable, such as "[redacted], Document D24 at p. 1." If there is no FOIA document number available, the document is cited to indicate whose testimony is relied upon and to identify the document, such as "[redacted] Statement to OSHA dated April 16, 1997 at p. 1."

[3] An OSHA investigation following the terminated employee's complaint found no merit to the allegations of retaliation. In July 1997, a DOL hearing was held appealing OSHA's determination of no probable cause; however, the DOL has not yet issued a final decision. The terminated employee's civil case resulted in a directed verdict for the defendant in July 1998 (appeal pending). The NRC investigated allegations of retaliation in 1997, though no enforcement action has been taken to date. It appears that the investigation was completed in 1998, and OI concluded that no further action was warranted.

After the Terminated Employee filed his DOL complaint, an OSHA investigation was initiated and the Supervisor was scheduled to be interviewed by OSHA. Prior to the Supervisor's interview, he met on April 16, 1997, with Corporate Counsel and informed her that he did not wish to be represented by company counsel during the OSHA investigation. Corporate Counsel advised the Supervisor that it was his right to meet privately with the investigator without counsel if he so desired. [redacted] at pp. 10-11. The Supervisor then informed Corporate Counsel that his statement probably would not be favorable to the company and asked if she would like to discuss what he planned to say. Corporate Counsel declined to discuss the content of the Supervisor's planned statement to OSHA. [redacted] at p. 11; [redacted] at p. 10.

C. Evidence suggests to FENOC's Corporate Counsel that the Supervisor was providing confidential documents and information to the terminated employee

In the course of representing FENOC in the two cases filed by the Terminated Employee, Corporate Counsel felt that the Terminated Employee's counsel had possession of certain FENOC documents that had not been produced by the company during discovery. Corporate Counsel also "suspected strongly," based on comments by the Terminated Employee's lawyer, that the Supervisor had been disclosing confidential information to the Terminated Employee and his attorney. [redacted] at p. 20; [redacted] at pp. 10-11.

On July 10, 1997, Corporate Counsel met with the Supervisor and another work team member (Employee One), who were scheduled to be deposed by the Terminated Employee's counsel. Corporate Counsel played a videotape, which explained the deposition process. After Employee One had left, Corporate Counsel asked the Supervisor about his knowledge of the working environment in the Terminated Employee's unit prior to the termination, and his understanding of the deterioration of the Terminated Employee's employment relationship with FENOC. [redacted] at p. 14. The Supervisor became uncooperative and refused to answer questions or provide any further information. [redacted] at pp. 16, 20.

Because the Supervisor was viewed as uncooperative, Corporate Counsel's suspicion increased that the Supervisor was providing the Terminated Employee and his counsel with unauthorized documents and information in violation of corporate policies. She accordingly cautioned the Supervisor that disclosure of their conversations to the Terminated Employee or his attorney could compromise FENOC's legal strategy, and that these conversations were legally protected and privileged. [redacted] at p. 15.

On or about July 13, 1997, the Terminated Employee's former Work Team Supervisor, contacted Corporate Counsel to express his concern based on a conversation with Employee One. Employee One reported to the Work Team Supervisor that the Terminated Employee had asked Employee One to provide him with a "tech spec and some other internal plant document" from Perry. Employee One had refused to provide these documents, but told the Work Team Supervisor that the Terminated Employee had also asked the Supervisor to provide him with the same documents. [redacted] at p. 27.[4] The Work Team Supervisor told Corporate Counsel he believed that the

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[4] The Supervisor confirms this request from the Terminated Employee. [redacted] at p. 34.

Supervisor was giving information to the Terminated Employee. [redacted] at p. 18. Corporate Counsel became more alarmed with this confirmation of her earlier suspicions about the Supervisor. [redacted] at p. 18. On July 15, 1997, Corporate Counsel received a phone call from Employee One. Employee One informed Corporate Counsel that he had recently received a phone call from the Terminated Employee during which he attempted to intimidate Employee One and influence his deposition testimony. [redacted] at p. 11; [redacted] at p. 18. The Terminated Employee interrogated Employee One about his beliefs regarding the propriety of the termination, and when Employee One informed the Terminated Employee he thought the latter deserved to be fired, the Terminated Employee threatened Employee One. [redacted] at pp. 10-11; [redacted] Affidavit in support of Motion for Protective Order. The Terminated Employee said that he would publicize an unauthorized tape recording he had made that contained some unfavorable comments that Employee One had made about his Work Team Supervisor if Employee One testified against the Terminated Employee. [redacted] at p. 11.

The phone calls from the Work Team Supervisor and Employee One supported Corporate Counsel's belief that the Supervisor was the likely source of the unauthorized disclosure of documents and information. Corporate Counsel took two actions in response. First, on July 16, 1997, she filed a motion for a protective order requesting the DOL Administrative Law Judge ("ALJ") to prohibit the Terminated Employee from having any further contact with the Supervisor, Employee One and another Member of the team. The ALJ granted the motion to the extent of ordering the Terminated Employee to refrain from any further contact with Employee One outside of formal discovery proceedings. Protective Order; [redacted] at p. 27. Second, Corporate Counsel, on the same date, called the Radiation Protection Manager (RPM) and asked him to "remind [Supervisor] of his obligation to the company, his duty of loyalty, his fiduciary responsibility, . . . and that he was not to reveal attorney/client privileged information." [redacted] at p. 19.

D. FENOC's Corporate Counsel urges the RPM to counsel the Supervisor about corporate policies and procedures

The RPM had been promoted to the position of Radiation Protection Manager in May 1997. The RPMs' new position placed him two levels above the Supervisor. [redacted] at p. 47; [redacted] Deposition dated March 6, 1998, at p. 43. Because the RPM was not assigned to this position until well after the Terminated Employee was terminated, the RPM saw no need to involve himself in the investigation or proceedings, and had made a conscious effort to distance himself as much as possible from the matter. [redacted] at pp. 7-9, 44; [redacted] Deposition dated March 6, 1998, at pp. 8, 28. Instead, the RPM concentrated on learning his new position and preparing his section for the upcoming refueling outage. [redacted] at pp. 34-35; [redacted], Deposition dated March 6, 1998, at p. 8.

The RPM's first involvement with the Terminated Employee proceedings occurred on July 2, 1997, when, at the request of the Human Resources Department, he merely distributed the subpoenas obtained by the Terminated Employees counsel to several employees, including the Supervisor. [redacted] at p. 7. The RPM does not recall specifically delivering a subpoena to the Supervisor, nor did he pay attention to the dates on which any of the employees would be deposed. [redacted] at pp. 7, 18, 47.

When Corporate Counsel contacted the RPM a couple of weeks later on July 16, 1997, she explained that there had been an unauthorized production of records and information to the Terminated Employee's attorney for which the Supervisor might be responsible. [redacted] at pp. 11, 14; [redacted] at p. 20. Corporate Counsel asked the RPM to "make sure that [Supervisor] understands that if he does need to give out any information – any information to [Terminated Employee] or [His] lawyer that are company records that really he should let [Supervisor] know about that." [redacted] at

pp. 11-12. Corporate Counsel sought to ensure that the Supervisor fully understood and complied with FENOC's corporate policy with regard to distributing any documents outside of the company. [redacted] at p. 27; [redacted] at pp. 15, 30, 51. There is no evidence that Corporate Counsel made any reference to the Supervisor's upcoming deposition during her conversation with the RPM, nor is there any evidence that Corporate Counsel gave the RPM any directions concerning the timing of his contact with the Supervisor.[5]

E. The RPM counsels the Supervisor on compliance with corporate procedures

Because the counseling session was not a disciplinary matter, the RPM saw no need to involve the Supervisor's immediate supervisor. [redacted] at pp. 47-48. After receiving Corporate Counsel's instructions, the RPM asked the Supervisor to see him later that day. [redacted] at p. 22; Counseling Memorandum dated July 17, 1997. As the RPMs' office cubicle lacked privacy, he followed his usual practice of suggesting that they walk around outside to protect the confidentiality of their discussion. [redacted] at p. 31; [redacted] at p. 22.

As they were walking, the RPM asked the Supervisor whether he had given out any company records or documents or discussed matters pertaining to the Terminated Employee's case with the Terminated Employee. [redacted] at pp. 12, 36; [redacted] at p. 25. The Supervisor responded that "after [Terminated Employee] initiated the lawsuit with Centerior he had no further discussion with [Terminated Employee] other than he understood that he may be subpoenaed by [Terminated Employee]." Counseling Memorandum dated July 17, 1997; [redacted] at p. 12; [redacted] Deposition dated March 6, 1998 at pp. 13-15. The RPM then "provided [Supervisor] with a copy of Centerior Corporate Reference Manual (CRM) LE-101 Conflict of Interests and CP-102 Corporate Compliance Program which provides guidance to all Centerior employees regarding activities affecting the corporation and providing confidential information to outside interests."[6] Counseling Memorandum dated July 17, 1997. The RPM had highlighted the portions he wished to emphasize to the Supervisor. The RPM explained that the Supervisor needed to be aware of these company policies if he furnished the Terminated Employee with any company information or documents. [redacted] Deposition dated March 6, 1998, at pp. 13-15. The RPM advised, "[J]ust as a reminder I want to just give you this information, [Supervisor], these are the – this is our code of conduct and our conflict of interest policies and I want to make sure you understand that." [redacted] at p. 12; [redacted] Deposition dated March 6, 1998, at pp. 13-15. Regarding the company records, the RPM cautioned the Supervisor, "If you need to [give out company documents], please let me know about that. And also I know [Corporate Counsel] is our legal counsel in this case, so please, you know, discuss that with her before you give out any records so that, you know, she can take the right – do the right things." [redacted] at p. 12; [redacted] Deposition dated March 6, 1998, at p. 16; Counseling Memorandum dated

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[5] The OI investigator did not ask Corporate Counsel whether her instructions to the RPM referred to the Supervisor's forthcoming deposition. Corporate Counsel would have confirmed that she did not mention the deposition while instructing the RPM to speak with the Supervisor.

[6] The corporate reference manual specifically required express permission of the corporation before the disclosure of any confidential or proprietary corporate information. The conflict of interest policy required written disclosure of any activity that may put the employee in a position adverse to the interests of the company, so that the company could investigate and properly resolve the issue. Document A16; Document H1 (attachment to letter from [redacted].

July 17, 1997. During their discussion, the RPM made no reference to the Supervisor's upcoming deposition and was unaware that he was scheduled to be deposed the following day. [redacted] at p. 47.

The Supervisor now contends that during the counseling session the RPM offered some advice to him to be careful about what he said. [redacted] at p. 25; [redacted] Document E2 at p. 43 (Deposition dated July 17, 1997). The RPM does not recall making any comment of this nature, nor does his contemporaneous counseling memo – which the Supervisor reviewed and did not challenge – contain either this statement or any reference to the Supervisor's impending deposition. [redacted] at p. 17. Indeed, the Supervisor himself did not mention this alleged comment in his initial complaint on July 16, 1997, to the NRC, nor in his July 17, 1997, letter to the ombudsman.[7] The RPM's testimony is further supported by evidence that Corporate Counsel did not refer to the deposition when instructing the RPM: that the RPM was unaware of the deposition date, and that the RPM disclaims any intent to influence the Supervisor's deposition testimony. [redacted] Trial Testimony dated July 15, 1998, at p. 454. At most, the RPM may have advised the Supervisor to be careful that anything he said to the Terminated Employee was in compliance with the company's conflict of interest policies. See [redacted] Deposition dated March 6, 1998, at p. 36.

Upon leaving the plant after the counseling session, the Supervisor went to the Terminated Employee's house and, after discussion with the Terminated Employee and at his suggestion, called the NRC. [redacted] at p. 30. He spoke that afternoon with the Region III Staff and described his version of the events that had transpired. According to the Supervisor, Region III Staff declared that, "it seemed pretty clear to him what happened." [redacted] at p. 30; [redacted] Document E8 at p. 2 (Time Line). The earliest record of this allegation as received by the NRC is a Memorandum AMS File No. RIII-97-A-0146 (Perry) dated August 1, 1997, more than two weeks later, produced in response to the company's FOIA request. Document D24. In addition, on the day after contacting Region III Staff, July 17, 1997, the Supervisor sent a letter to the Perry ombudsman, alerting him to the complaint. Document B2 at p. 3. As indicated previously, neither document refers to any comment suggesting that the Supervisor be careful.

F. The RPM documents the counseling discussion

On July 17, 1997, the RPM decided to document his communication with the Supervisor by placing a memorandum in the section file detailing the content of their discussion. [redacted] at pp. 15-16. Based on Corporate Counsel's interest, the RPM felt his contact with the Supervisor should be documented. He also wanted to confirm to Corporate Counsel that, as she had requested, the Supervisor had been advised of the company policies. [redacted] at p. 16. The memorandum characterizes the meeting between the RPM and the Supervisor as a "Counseling Session" and reflects that the crux of the RPMs' communication with the Supervisor was that further unauthorized discussions with the Terminated Employee pertaining to his case "presented a *potential* conflict of interest." Counseling Memorandum dated July 17, 1997 (emphasis added). The counseling memorandum reveals that the RPM told the Supervisor that "consistent with the guidance in LE-101 any further discussions with [Terminated Employee] involving this lawsuit would require written disclosure," and he "encouraged [Supervisor] to continue communicating with [Corporate Counsel]."

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[7] The Supervisor was not asked during his OI interview why he had not referred to this significant comment in his contemporaneous complaints both to the NRC and the ombudsman.

Counseling Memorandum dated July 17, 1997. The memorandum to file was not intended by the RPM to constitute any form of disciplinary action, and nothing in the counseling memorandum refers to discipline. [redacted] Deposition dated March 6, 1998, at pp. 21, 34. As the RPM stated, "[T]here was nothing [about which] to reprimand." [redacted] at p. 16.

On July 21, 1997, the RPM met with the Supervisor and asked him to review the memorandum for accuracy. [redacted] at pp. 18-19; [redacted] Document E8 at p. 3 (Time Line). The Supervisor reviewed the memorandum, and then told the RPM that he believed the memorandum was incomplete because it did not mention that the Supervisor had kept Corporate Counsel and the acting Radiation Protection Manager prior to the RPM, informed of his interactions with the Terminated Employee. [redacted] at p. 22; [redacted] at pp. 35-36. At the Supervisor's request, the RPM amended the memorandum to reflect the Supervisor's communications with Corporate Counsel and acting Radiation Protection Manager. [redacted] at p. 36; [redacted] Document E8 at p. 3; [redacted] at p. 22. However, when the RPM met with the Supervisor after making the changes, the Supervisor still refused to sign the letter because he "didn't feel that [he] was in a conflict of interest with the company," even though he no longer disputed the accuracy of its contents. [redacted] Trial Testimony dated July 15, 1998, at p. 472; [redacted] Report in Response to the Nuclear Regulatory Commission's May 20, 1999, Letter to FirstEnergy Nuclear Operating Company ("Briggs Report") at p. 13; [redacted], Deposition dated March 6, 1998, at p. 19. The RPM explained to the Supervisor, "I still want to put this in your file though so that it records that we had this conversation." [redacted] at p. 19. The RPM, therefore, signed the memorandum "[RPM] for [Supervisor] who declined signature" and dated the signature July 21, 1997. Counseling Memorandum dated July 17, 1997. After the conclusion of their discussion, the RPM placed the memorandum in the Supervisor's section personnel file and forwarded copies of the memorandum to Corporate Counsel and to the Human Resources Department. [redacted] at p. 36; [redacted] at p. 29; Counseling Memorandum dated July 17, 1997.

G. FENOC withdraws the counseling memorandum and removes it from the Supervisor's file

The ombudsman had in the meantime reviewed the Supervisor's July 17, 1997, letter and determined that the RPMs' actions had been appropriate. He felt, based on the Supervisor's description, that appropriate actions had been taken by the RPM to counsel the Supervisor, and that no further action was warranted at the time. [redacted] at pp. 8-9. However, in early November, the ombudsman reopened the investigation in response to inquiries from senior management and the Supervisor's concerns about the counseling memorandum in his file. [redacted] at p. 9; [redacted] at p. 40.

In December 1997, upon completion of the investigation, the ombudsman, together with then Vice President - Perry, concluded that the memorandum served no purpose and should be removed from the Supervisor's file. [redacted] at pp. 21-22. At approximately the same time, the RPM also decided, of his own accord, to remove the letter from the Supervisor's file because he was aware that it had been "bothering" the Supervisor. [redacted] at p. 27; [redacted] Deposition dated March 6, 1998, at p. 20. Consequently, the RPM met with the Supervisor in January 1998 and informed him of the decision to withdraw the counseling memorandum. [redacted] at pp. 28-29; [redacted] at pp. 46-47. On February 3, 1998, the ombudsman provided the Supervisor the original memorandum from his section personnel file and one copy from Human Resources. The ombudsman indicated that two additional copies remained to be located, one to the Human Resources Supervisor and one to Corporate Counsel. The Supervisor was later advised that the Human Resource Supervisor's copy of the counseling memorandum had been destroyed and that Corporate Counsel had been unable to locate her copy. Document B2 at p. 4 (Memorandum to [redacted] from [redacted] dated February 3, 1998); [redacted], Deposition dated March 27, 1998, at p. 27.

H. Post-counseling session events

The Supervisor has not been disciplined in any way for his refusal to cooperate with the company in its defense of the litigation involving the Terminated Employee. In fact, subsequent to his deposition in July 1997, the Supervisor appeared as a witness for the Terminated Employee in both DOL case and civil suit in the Ohio Court of Common Pleas.[8] The company has not discriminated or retaliated against him in any way for this continued support of the Terminated Employee. The Supervisor's performance appraisals since his counseling session have been acceptable, and he has received a rating of "Meeting Expectations" in company terminology. Neither his 1997 nor 1998 appraisals make any mention of his role in the litigation involving the Terminated Employee. The Supervisor signed off on both of these appraisals without comment.

Legal Argument Supporting FENOC's Position

A. Energy Reorganization Act Section 211 and 10 CFR 50.7 prohibit only acts intended as retaliation.[9]

The NRC regulation allegedly violated here stems from the prohibition in the Energy Reorganization Act against retaliatory conduct for engaging in various protected activities:

> No employer may discharge any employee or otherwise discriminate against any employee . . . *because the employee* [engaged in protected activity].

42 USC 5851(a) (emphasis added).

The language of 10 CFR 50.7 incorporates the same requirement:

> Discrimination. . against an employee *for engaging in certain protected activities* is prohibited.

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[8] [redacted] v. Centerior Energy Corp., et al., Case No. 97CV001078. The Terminated Employee is currently appealing the dismissal of his civil suit.

[9] FENOC believes that the requirement that an adverse action be intended as retaliation is clear from the statute, regulation and case law. However, because the OI Report does not expressly make such a finding, and NRC staff documents indicate substantial doubt on this critical fact, Document D20 (Memorandum from J. Grobe to H.B. Clayton regarding review of OI Report observing that "the intent of the counseling could not be clearly established"), discussion of the legal requirements seems appropriate.

10 CFR 50.7(a) (emphasis added).

This requirement that the adverse action be in retaliation for the protected activity is further underscored by the language of 10 CFR 50.7(d):

> (d) Actions taken by an employer . . . may be predicated upon non-discriminatory grounds. The prohibition applies when the adverse action occurs *because the employee has engaged in protected activities.* An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by non-prohibited considerations. (emphasis added)

The nearly identical language in Title VII of the Civil Rights Act, from which these whistleblower protections are derived, contains the same requirement of intentional retaliatory conduct:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . *because* he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this title.

42 USC 2000e-3(a) (emphasis added).

When the courts, in both the ERA and Title VII contexts, require proof that the adverse action was intended to punish the employee for the protected activity, they are only recognizing the idea inherent in the concept of retaliation. As a State Supreme Court has recently stated in the context of a statute prohibiting retaliation against witnesses:

> A person can act in a retributive or retaliatory fashion only if she has a conscious objective to do so. Thus, the statute by the plain meaning of its terms requires the defendant to have as her conscious objective the intent to inflict harm on a specific person for a specific reason -- that is, the specific intent to retaliate or to seek retribution against a person protected by the statute because of that person's relationship to a criminal proceeding.

People v. Hickman, 988 P.2d 628, 645, cert. denied, 1999 Colo. LEXIS 1184 (Colo. Nov. 29, 1999); See also Gunnell v. Utah Valley State College, 152 F.3d 1253, 1263 (10th Cir. 1998) ("A showing of retaliatory motive has long been relevant to the causation prong of a retaliation claim"); Herron v. Tennessee Board of Regents, 1994 U.S. App. LEXIS 33741 at *14 (6th Cir. 1994) ("In short, some concrete, affirmative proof of discriminatory or retaliatory intent or effect must be offered to establish a prima facie employment discrimination case, not to mention to rebut an employer's legitimate, nondiscriminatory reasons for its actions") (citation omitted).

Thus, in Fugate v. TVA, 95-ERA-50 (ARB 1996), the Board noted that the complainant in a retaliation case must establish that ". . .the adverse action was retaliatory in response to the protected activity." 1996 DOL Ad. Rev. Bd. LEXIS 80 at *2 (Dec. 12, 1996). In an earlier decision, the Fifth Circuit in 1986 held that an employee complaining of a retaliatory discharge ". . .may prevail only if he would not have been discharged *but for* his participation in the statutorily protected activity." Dunham v. Brock, 794 F.2d1037, 1040 (5th Cir. 1986) (emphasis in original). In this proceeding as well, the NRC would have to establish that the RPM took an adverse action against

the Supervisor in order to retaliate against him for some protected activity. The evidence does not support such a finding.

In analyzing the evidence related to the NOV, we must first address the actions of FENOC's Corporate Counsel. Although her conduct is not the basis of the NOV, it clearly played a determinative role in causing the counseling meeting with the Supervisor which is a portion of the NOV's charge, and equally clearly was motivated only by a desire to ensure compliance with legitimate corporate policies. Corporate Counsel was engaged in contentious litigation with the Terminated Employee, who had been terminated after efforts to improve his work performance had failed. An OSHA investigation had concluded that the Terminated Employee's claim of retaliation was without merit. Corporate Counsel believed that the Supervisor was improperly providing documents and information to the Terminated Employee and his counsel. While the Terminated Employee's litigation is protected activity, FENOC is entitled to the protection of the existing procedures and legal rules in presenting its defense to the charge, and is not required to allow employees to misappropriate its documents without penalty simply because they are being used in connection with a protected proceeding.

In Dartey v. Zack Co., 82-ERA-2 (Sec'y Apr. 25, 1983), slip op. at 12, the Secretary of Labor affirmed the dismissal of a retaliation complaint brought by a plaintiff who was terminated from employment when he was caught by plant security attempting to remove confidential company records from the plant, The Secretary wrote that the plaintiff had "committed an act which no employer need tolerate –misappropriation of confidential company records - which warranted suspension or discharge . . ." Similarly, in Hodgson v. Texaco, 440 F.2d 662 (5th Cir. 1971), where the employee's claim was that he was appropriating the records for use in a protected proceeding under the Fair Labor Standards Act, the Court rejected any notion that such tactics were acceptable even if in aid of protected activity.

Here also, the Terminated Employee, had ample opportunity, through discovery and the assistance of the court, to seek whatever documents were relevant to his claim; he was not entitled to subvert those legal procedures and have the materials removed surreptitiously from the plant.

Corporate Counsel's actions in contacting the RPM and asking him to counsel the Supervisor on the topic of improper release of corporate information make clear that this was her motivation, rather than any improper attempt to punish the Supervisor for his conduct. While she specifically told the RPM to address the issue, she made no reference to the Supervisor's upcoming deposition, although she knew when it was scheduled; she did not direct the RPM to conduct this counseling at any particular time, and was apparently agreeable to having it occur after the deposition; and she did not suggest or direct any documentation of the counseling session.

It is equally clear that the RPMs' actions do not support a finding of any intent to retaliate. We begin with the steadfast denial of any such intent by the RPM, an experienced employee with an extensive background in the nuclear industry and a demonstrated commitment to safety in nuclear operations. While the NRC may lack the detailed knowledge of the RPM which FENOC enjoys, the objective evidence gathered during the investigation confirms this picture of his character and contradicts any notion of retaliatory conduct. It is uncontroverted that the RPM made a conscious effort to avoid entanglement in the Terminated Employee's litigation, which had predated the promotion of the RPM to his current position and in which he had no personal involvement. Without the direction of the Corporate Counsel, the RPM never would have contacted the Supervisor about the company policies. When he did meet with the Supervisor, the RPM was unaware of the scheduled deposition the next day, but in any event confined his remarks to inquiring about the passing of documents and information to the Terminated Employee, a question which was clearly proper even if the RPM was aware of the deposition date. When the Supervisor denied any such

activity, the RPM simply provided the relevant policies and procedures and directed that the Supervisor be guided by them in his future conduct. Even if it were concluded that the RPM had misinterpreted the corporate policies and was in error in his advice to the Supervisor about what they allowed or prohibited, the case law makes clear that the counseling would still not rise to the level of retaliation. The good faith belief that the counseling was warranted by the RPMs' understanding of the policies would preclude any finding of retaliatory intent, and hence of any violation. See Jeffries v. Harris County Community Action Ass'n, 615 F.2d 1025, 1036 (5th Cir. 1980):

> ". . .[W]hether HCCAA was wrong in its determination that [plaintiff] acted in violation of HCCAA guidelines in copying and disseminating the materials is irrelevant. In Turner v. Texas Instruments, Inc., 555 F.2d 1251 (5th Cir. 1977), we held that where an employer wrongly believes an employee has violated company policy, it does not discriminate in violation of Title VII if it acts on that belief."

Jeffries, 615 F.2d at 1036.

The contemporaneous documentation of the session by the RPM, which appears to form the basis for the NOV, is also appropriate and by its terms contradicts any inference of a retaliatory intent. It acknowledges the Supervisor's statements that he had no contact with the Terminated Employee, and describes the RPMs' guidance about how to proceed in the future if other requests for documents or information were received. The memorandum was presented to the Supervisor for his review and approval. The Supervisor suggested certain additions, which the RPM incorporated. Although the Supervisor still refused to sign the document, his stated reason was that he "had not been engaged in any conflict of interest." He did not claim that he was withholding his signature because the document was inaccurate.

Counseling an employee and documenting the counseling in the employee's record are well-recognized and appropriate methods of managing personnel. The counseling emphasizes the training point to the employee, makes a record for future reference by either the employee or his managers, and provides an opportunity to clarify or elaborate on corporate policies for the benefit of both the employee and supervisors.

The test of whether this conduct of documenting the counseling session is proper cannot turn on whether it is described in some manual as, or was thought by anyone to be, part of a disciplinary process. The first hurdle, as we have discussed, is whether it was prompted by or done because of an intent on the RPMs' part to retaliate against the Supervisor for assisting the Terminated Employee in his litigation. FENOC believes no fair reading of the evidence supports the view that it was so intended. Thus, even if it were part of a disciplinary process, it would be proper because it was undertaken for a legitimate reason. 10 CFR 50.7(d).

The OI Report appears to find discrimination only in the placing of the memorandum in the file, and not in the counseling session itself. The "Conclusion" (OI Report p. 18) states

> ". . . it is concluded that [Supervisor] was discriminated against *after* [RPM] counseled [Supervisor] on the day before he was scheduled to provide a deposition . . . "

(emphasis added).

FENOC is at a loss to understand how it can be that a counseling session to emphasize legitimate corporate policies, directed for a proper purpose by corporate counsel and carried out by a manager without any intent to retaliate for protected activity, can lead to a violation of 10 CFR 50.7 because it is accurately documented in the employee's file. If FENOC had a supervisor who was thought to be insufficiently sensitive to safety-conscious work environment issues and was counseled by management about the importance of encouraging such an environment, it would seem impossible to conceive of the documentation of this counseling in his file as a regulatory violation. It would also seem irrelevant to the question of intent whether or not the documentation was considered to be part of a disciplinary process.

The other flaw in the allegation of a 10 CFR 50.7 violation is that the regulation, like the statute from which it derives, requires tangible adverse impact on employment. No evidence in the record supports any such finding, but the case law clearly requires such proof.

B. Adverse action requires a tangible impact on employment.

In order to establish even a prima facie case of retaliation under the ERA, the employee must have suffered an adverse employment action. Kahn v. Secretary of Labor, 64 F.3d 271, 277 (7th Cir. 1995); see also Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989). Neither the counseling session nor the withdrawn letter of counseling constitutes an adverse employment action. First, as discussed previously, both the counseling session and the subsequent memorandum to file do not criticize the Supervisor's performance, and no disciplinary action was ever considered or taken against him with regard to this matter. Second, FENOC removed the counseling memorandum from the Supervisor's file. Finally, the counseling session and the memorandum to file had no impact whatsoever on the Supervisor's terms, conditions, or privileges of employment at FENOC.

Assuming that either the counseling session or the counseling memorandum was intended as a retaliation, well-settled case law demonstrates that neither of these mediate decisions rises to the level of an adverse employment action in the retaliation context. An actionable adverse action requires some "materially adverse" change in the terms, conditions, or privileges of employment – some "tangible employment action" taken in retaliation against the employee. As the Supreme Court has recently stated, "A tangible employment action constitutes (1) a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or (2) a decision causing a significant change in benefits." Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (1998); see also Trimmer v. DOL, 174 F.3d 1098, 1103 (10th Cir. 1999) (asserting "not everything that makes an employee unhappy is an actionable adverse action") (citation omitted); Allen v. Michigan Dep't of Corrections, 165 F.3d 405, 417 (6th Cir.), reh'g denied, No. 97-1720, 1999 U.S. App. LEXIS 2176 (Jan. 26, 1999) (requiring plaintiff to demonstrate "materially adverse" change in his terms or conditions of employment). [10]

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[10] The DOL considers Title VII cases valuable and persuasive authority in retaliation cases, and has consistently utilized Title VII analysis and case law in interpreting whistleblower claims. See, e.g., Trimmer, 174 F.3d at 1103 (applying Title VII analysis to the issue of whether a plaintiff suing under the ERA suffered an adverse employment action); Martin v. Dep't of the Army, 93-SDW-1 at 6-7 (ARB July 30, 1999) ("Because Title VII . . . utilizes virtually the same language in describing prohibited discriminatory acts and shares a common statutory origin, the Board and the Secretary have looked to law developed under Title VII for guidance . . .");

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There is no evidence to support that either the counseling session or the memorandum to file had any impact at all on the Supervisor's employment at FENOC. The Supervisor has received favorable performance evaluations since the RPM counseled the Supervisor and placed the memorandum in his file. The Supervisor's performance was consistently rated as "Meets Expectations" for the years of 1997 and 1998.[11] Moreover, the Supervisor continues to hold the same position he held prior to the counseling session, and there has been no impact on his responsibilities, compensation, or benefits. Significantly, even the Supervisor has admitted that he never suffered any tangible employment action from the memorandum documenting the counseling session, and the Supervisor specifically told the then Vice President - Perry, that he had no further concerns once the counseling letter was withdrawn. [redacted] Document E7 ([redacted] letter to R. Doombos dated January 12, 1998); Document F3 (Document generated by Enforcement Staff as summary of letter from [redacted]); [redacted] Document H1 at pp. 2, 5 (Letter to NRC dated March 15, 1999); Executive Summary, Briggs Report.

Similar cases judged under the Burlington standard hold that, absent some tangible job detriment, the prima facie prong requiring an adverse employment action cannot be satisfied. In Sweeney v. West, 149 F.3d 550 (7th Cir. 1998), for example, the plaintiff claimed that she received two counseling statements in retaliation for her earlier complaints about her supervisors. The court noted that neither counseling statement imposed any discipline on the plaintiff and determined that "instances of different treatment that have little or no effect on an employee's job" cannot constitute retaliation. Id. at 556-57. See also Koschoff v. Henderson, No. 98-2736,1999 U.S. Dist. LEXIS 16184 at *35-43 (E.D. Pa. Oct. 7, 1999) (letters of warning temporarily placed in plaintiff's file but later removed were not materially adverse employment actions); Wetter, 1999 U.S. Dist LEXIS 15683 at *12-17 (written Counseling Notes issued to plaintiffs did not constitute adverse employment actions); Helgeson v. American Int'l Group, Inc., 44 F. Supp. 2d 1091, 1099 (S.D. Cal. March 2, 1999) (concluding verbal reprimands did not comprise adverse employment actions) (amended on

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Coppack v. Northrup Grumman Co., 98-SWD-2 at 27 (ALJ July 24, 1998) (commenting on the Secretary's application of Title VII hostile work environment analysis to whistleblower cases in Varnadore v. Oak Ridge Nat'l Lab. 92-CAA-2 at 47-50 (Sec'y Jan. 26, 1996), and noting that the Secretary "opined that the factors delineated by the Supreme Court are equally applicable to environmental whistleblower cases"). Though some earlier DOL decisions have held that mere verbal counseling sessions or counseling letters may be tantamount to adverse employment actions, these decisions allowing mediate employment decisions to constitute adverse actions must be reconsidered in light of the Supreme Court's ruling in Ellerth, 524 U.S. at 761, in mid-1998. Since this ruling, lower courts have determined that the definition of an "adverse employment action" in all types of employment discrimination cases is now controlled by the Supreme Court's requirement of a "tangible employment action." See, e.g., Wetter v. Munson Home Health, No. 1:98-CV-807, 1999 U.S. Dist. LEXIS 15683, at *11-13 (W.D. Mich. Oct. 4, 1999) (discussing adverse employment action element of age discrimination claim by using the Burlington definition of a "tangible employment action").

[11] FENOC's Performance Management Program includes four rating levels: New in Position, Does Not Meet Expectations, Meets Expectations, and Exceeds Expectations. The vast majority of FENOC employees are rated as Meets Expectations.

other grounds); Hicks v. Brown, 929 F. Supp. 1184, 1190 (E.D. Ark. 1996) (holding that verbal counseling and a lower performance rating on plaintiff's proficiency report did not rise to the level of adverse employment action).

In the few anomalous cases, decided prior to Burlington, that permit a letter in an employee's file to suffice as an adverse action, the letters were clearly intended as disciplinary measures, and even these cases recognize that a different situation is presented when the letter has been withdrawn. For instance, in Hopkins v. Baltimore Gas & Elec. Co., 871 F. Supp. 822, 836 (D. Md. 1994), aff'd, 77 F.3d 745 (4th Cir. 1996), the court determined that no reasonable jury could find that a formal warning that was placed in the plaintiff's file, but was later removed, could sustain a claim of retaliation. See also Fowler v. Sunrise Carpet Indus., 911 F. Supp. 1560, 1583 (N.D. Ga. 1996) (observing that a withdrawn written reprimand does not qualify as an adverse action, unless the reprimand expressly "threaten[s]" immediate discharge).

Indeed, before investigation into the Supervisor's NRC complaint commenced, the Enforcement Staff repeatedly questioned whether the Supervisor had suffered any adverse employment action from either the counseling session or the subsequent memorandum. Based on the Supervisor's complaint about the counseling session with the RPM, the Enforcement Staff initially determined that "no action ha[d] been taken against the alleger." Document D26. The issue of the letter placed in the Supervisor's file was not even raised by the Enforcement Staff as a potential adverse employment action until five months after the Supervisor's initial complaint. In December 1997, the Enforcement Staff contacted the Supervisor to inquire as to whether the "threat" of the future "verbal reprimand" had been carried out. It was during this conversation, five months after the counseling session, that the Supervisor first disclosed the existence of the counseling memorandum to the NRC. Document D29 (Memorandum to File by R. Doornbos documenting conversation with [redacted] dated December 10, 1997). At first, the Enforcement Staff also doubted that the counseling memorandum could be an adverse employment action, and acknowledged that the investigation could not proceed without this critical finding. Document D31.

In sum, the Supervisor has suffered no adverse employment consequences as a result of either the counseling session or the subsequent memorandum to file. The Supervisor's job title, responsibilities, compensation, and benefits all either have remained unchanged or have improved since his involvement in the matter of the Terminated Employee. Further, the Supervisor has continued to receive favorable performance evaluations since his involvement and participation in the Terminated Employee's case against FENOC. Because the Supervisor has not experienced any adverse employment action, an essential element of the prima facie case of retaliation is missing.

ANSWER TO A NOTICE OF VIOLATION

Pursuant to 10 CFR 2.205(b), FENOC files this Answer to the Notice of Violation issued May 20, 1999 (EA 99-012). FENOC denies the alleged violation for the reasons stated in the Reply to the Notice of Violation (the "Reply") filed herewith and specifically incorporates the information provided and issues addressed in the Reply.

In addition, for the reasons stated below, FENOC believes that the Notice of Violation should be dismissed. In the alternative, FENOC requests the complete remission of the proposed civil penalty of $110,000.

Statement of Position

FENOC believes that the extenuating circumstances present here are unique. This is a case involving a mix of difficult legal judgments as well as easily misunderstood and oversimplified facts. There are several key elements in this case that deserve careful review. One is the NRC decision to initiate an OI investigation in the first place. A second is the consistency of the testimony of the two individuals most central to the crucial facts at issue. Third is the accuracy of the OI investigation on which the decision to initiate enforcement action is based. Fourth, there is an inconsistent record of decision leading to enforcement action and therefore a probable misunderstanding of the facts at issue supporting that decision. Finally, there are policy implications involved that weigh against taking enforcement action in this instance.

It is too easy to view this case as simply one where a manager, alerted to the fact that one of the people in his section was about to testify adverse to the company and in support of a friend who had been discharged by the company, took it upon himself to attempt to impact that testimony. Were that the case, FENOC would long ago have taken drastic steps to ensure correction and assurance that no repeat could occur. That view of the case is simply not supported by the facts.

1. The OI Investigation

As the statement of facts in the Reply details, the Supervisor initially complained to the NRC on July 16, 1997, following his conversation with the RPM. But the complaint itself is not all that is significant. There are a number of details about the timing of this complaint and the NRC reaction that bear careful scrutiny. First, the call to the NRC did not take place immediately after the discussion with the RPM. Rather, it took place after the Supervisor left the site and discussed the situation with his friend, a previously discharged employee who was embroiled in highly contentious litigation with the company in which substantial financial damages were sought. It was only after this conversation, and at the suggestion of his friend, that the Supervisor placed his initial call to the NRC. During the call to the NRC, the Supervisor complained about the discussion with the RPM. In response to the Supervisor's call, the NRC employee reportedly observed: "it was pretty clear to him what the company was doing." It appears that both the visit to the ex-employee friend and the call to the NRC may have influenced the Supervisor's views of the discussion with the RPM.

Neither the Supervisor's complaint to the NRC on July 16, 1997, nor his next day letter, which simply confirmed that he had complained to the company that he was being harassed, resulted in an NRC determination to initiate an OI investigation or to take other action. In fact, Allegation Review Board notes of August 1, 1997, reflect the view that "no action has been taken against the alleger." FOIA Document D26. The plan of action for the NRC was to refer the case to

"DOL-OSHA" and to call the Supervisor and advise him "why it is currently not an NRC chartered action." Document D27.

Not until about December 1997 does there appear to be any action within the NRC on the July complaint. At that time the focus shifted from the discussion between the Supervisor and the RPM to the counseling memorandum that the RPM had placed in the Supervisor's section file to document their discussion. It was only after his discussion with the Supervisor that the RPM decided to document the discussion, and the RPM did not raise the issue of the counseling memorandum with the Supervisor until July 21, 1997. Five months later, in December 1997, the Supervisor first informed the NRC about the memo. It was not until after this contact in December 1997 that the NRC considered whether the counseling memorandum in the file constituted disciplinary action such that an OI investigation was warranted. Document D31. Apparently an affirmative answer, which has been withheld from FOIA disclosure, came in January or February of 1998, and an OI investigation was launched in early February.

Several other relevant events took place at about the same time. In early February, the Supervisor, unhappy with the lack of action by the NRC on his July 1997 complaint, was considering contacting the NRC Inspector General with his concern about the inaction. Documents D38, D39, D40. Meanwhile, the RPM removed the offending memorandum from the Supervisor's section file and returned it to the Supervisor. This prompted the Supervisor to withdraw a related DOL complaint and also to alert the NRC that the complaint had been withdrawn. He requested that the NRC continue the investigation, however, on the basis of his belief that a comment made by the RPM was a threat. Document D40.

To summarize, after his discussion with the RPM, the Supervisor had conversations with the discharged employee who was in litigation with the company and with an NRC representative. Both of these discussions may have influenced the Supervisor's view of the discussion with the RPM. The Supervisor's conversation with the RPM did not prompt the NRC to launch an OI investigation. Only some five months later when the focus became the RPM's counseling memorandum was a basis found to initiate an OI investigation. The NRC continued its investigation even though the Supervisor alerted the NRC that the memorandum in question had been removed from his file, and the NRC itself had previously rejected the conversation between the RPM and Supervisor as an independent basis for investigation. FENOC believes that the basis for the investigation (the counseling memorandum) had been removed, and the investigation could and should have been terminated.

2. Consistency of Witness Testimony and OI Report

The second factor is the consistency of the testimony of the two central figures in this case - the Supervisor and the RPM. Also, because the Supervisor's recollection of the facts has been accepted by OI at each step, the third factor, namely the accuracy of the OI report, is addressed here as well. The RPM's testimony has been consistent, and therefore credible. His inability to remember, months and years later, every element of the critical conversation with the Supervisor is not suspicious, but entirely believable. To the contrary, the Supervisor's memory of the conversation, which appears to have become more detailed with time, should raise questions. Two significant examples follow:

- The most basic of the differences between their versions of the conversation are their respective views on whether the Supervisor said he was providing information/documentation to the former employee which that employee could use in his litigation against the company. The RPM has maintained that the Supervisor told him no information/documentation had been provided to the

litigant and that he was relieved to get that response. The RPM's actions thereafter are consistent with that answer: he did not immediately call back the company attorney and report that something had been provided to the other side in the litigation; he did write a report to the Supervisor's section file which he denoted as a Counseling Memorandum; and he took no further action in this matter with respect to the Supervisor. In contrast, the Supervisor's characterizations of the conversation vary. All have the common thrust that the RPM told him that he was in conflict with company policy. In various testimonies, the Supervisor then sometimes says that he was told that he was receiving a verbal reprimand at the time, will receive a reprimand, and/or will get a letter of reprimand in his file. FENOC believes, and the RPM consistently states, that the RPM was satisfied with the Supervisor's response that no information/documentation had been given to his friend the litigation opponent, that he simply documented his conversation in the section file and that he went on treating the Supervisor like every other employee in his section, never using the conversation in any negative way.

- A second difference is whether the RPM cautioned the employee to be careful in his conduct in the course of the ongoing proceeding between the ex-employee and the company. The RPM does not remember saying this; but even if he did, it seems to FENOC difficult to criticize this sensible advice in regard to a difficult and contentious case. It should be taken for what it is - sage advice from a caring manager. FENOC found no basis to read into it a threatening interpretation that it was intended to influence the Supervisor's deposition testimony the next day. FENOC has had no indication that this RPM would ever entertain such a remarkable objective. The one indicator that the Supervisor points to, and the NRC apparently accepts, is that the deposition was scheduled for the next day. The RPM maintains, however, that if he once knew the date of the Supervisor's deposition, he was not aware of it when he spoke with the Supervisor on July 16, 1997, and that he was responding only to the company attorney's call registering concerns with information or documentation flow to the other side. The evidence supports that the RPM is telling the truth and that, at worst, the Supervisor misunderstood the RPM's intent, given the timing of the counseling. The evidence verifies that the RPM's attempts to disassociate himself from the litigation were genuine, led to his lack of direct knowledge about the timing of his employees' depositions in the case, and contributed to his belief that the counseling session with the Supervisor was appropriate.

FENOC believes there are other indications that should lead one to question the accuracy of the Supervisor's recollection of the facts. For example, following the company's March 10, 1999, response to the NRC in lieu of attending an enforcement conference, the Supervisor filed, at the NRC's invitation, a response which questioned the RPM's and more generally the company's integrity. The NRC then sent a May 20, 1999, letter in which it asked FENOC to reply to the Supervisor's allegations. FENOC's response did not rely upon its own knowledge of the facts, but was based upon the results of an independent investigation. This investigation was conducted by Mr. William Briggs, from the law firm of Ross, Dixon & Bell, of eight areas alleged by the Supervisor to be wrongly represented by the company in its March 10 response. Mr. Briggs found baseless all eight areas of alleged misrepresentation. For instance, the Supervisor challenged FENOC's statement that the RPM reviewed a draft of the counseling letter with the Supervisor for the purpose of reaching a consensus as to what was discussed. Mr. Briggs determined that the RPM had revised the letter to incorporate the Supervisor's views of their discussion, and the Supervisor even admitted that he did not dispute the factual accuracy of the document. The Supervisor further claimed that FENOC's statements were "incorrect" concerning the Supervisor's expressed satisfaction with the resolution of his complaint after the counseling memorandum was removed from his file. Mr. Briggs concluded that, to the contrary, on several occasions the Supervisor had responded to inquiries about the resolution of his complaint in a positive manner and never mentioned that he remained dissatisfied after the counseling memorandum was removed from his file. Mr. Briggs found, in fact, that the Supervisor did not advise FENOC about his continued dissatisfaction until after FENOC received the NRC's letter identifying an apparent violation in

January 1999 and that the Supervisor's contentions were otherwise unfounded. Mr. Briggs' *Report in Response to the Nuclear Regulatory Commission's May 20, 1999 Letter to FirstEnergy Nuclear Operating Company* was provided to the NRC in August 1999.

It appears to FENOC that whenever there are differences between the Supervisor's account and that of other FENOC employees, the OI Report seems to accept uncritically the Supervisor's version. FENOC believes that, with the course followed in this investigation, it was inevitable that the outcome would favor the complainant. It appears that, during the time this was under NRC investigation and consideration up to the decision to issue an NOV, there were some 58 contacts between the NRC and the complainant. A comparison of the Supervisor's interview by OI with those of other FENOC employees involved in this case suggests that a different and unusual approach was taken in the interview of the Supervisor: He was allowed to read a written statement prepared by his counsel with minimal probing or questions from the investigator and little attempt to explore the basis for his claims.

There are misstatements by the OI investigator in interviews with some FENOC employees. In addition, errors and incomplete evidentiary summaries in the OI report suggest a bias that may be key to the impression left on a reader. Some examples follow:

- In the interview of the Supervisor the investigator asked: "Did you ask [the RPM] why he gave you the letter of reprimand the day before the deposition?" This of course characterizes the memorandum to the file as a letter of reprimand rather than as a counseling memorandum. Moreover, this improper characterization erroneously suggests that the memorandum was a topic discussed on July 16, 1997, when in fact it was not conceived by the RPM until after the discussion and by the Supervisor's own testimony was not presented to him until five days later on July 21.

- In the interview of the company attorney, which immediately followed the interview of the RPM, the OI investigator prefaced a question by saying that: "...[the RPM] advised [the Supervisor] that the meeting constituted a verbal reprimand and that a letter of counseling was going to be placed in [the Supervisor's] file." This of course was the Supervisor's view of the conversation but was not what the RPM had just maintained minutes before in the preceding interview.

- The Supervisor's testimony as to whether the counseling session was to serve as a "verbal reprimand" reflects yet another inconsistency. In the Supervisor's March 3, 1998, interview with OI, he contends that the RPM told him that the counseling session would constitute a verbal reprimand. Supervisor at p. 23. The Report of Investigation relies on this erroneous characterization of the counseling session. Report of Investigation at p. 15. In every other record recounting the Supervisor's version of the discussion, he claims the RPM said that he *would be receiving* a verbal reprimand. Significantly, the Supervisor used this language both in his initial complaint to the NRC on July 16, 1997, and in his letter to the Perry ombudsman of July 17, 1997.[1] In his deposition on March 27, 1998, the Supervisor remembered yet another version of the events. In the deposition, the Supervisor claimed the RPM "told [him] that [he] would receive a verbal reprimand, *which [he] received later that evening,*" though no other evidence (including

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[1] Both of these documents were available to OI, but the Supervisor was never asked about which version of this event was the correct one, and why he changed his story.

the Supervisor's own testimony on many other occasions) supports this version. Considering the Supervisor's inconsistent testimony and the RPM's understanding, derived from the discussion, that the Supervisor had not passed any confidential documentation or information to the former employee, the only logical way to interpret this statement, if it was made by the RPM, is that the RPM told the Supervisor that he *would receive* a verbal reprimand if he was *later* found to be in *actual* (not potential) conflict of interest. In any event, the Supervisor did not receive a verbal reprimand and no disciplinary action was ever taken against the Supervisor.

- In the interview of the RPM, the investigator stated: "Both [of the Supervisor's co-workers] put conflict letters in their files...", which necessarily singled out the Supervisor as being treated uniquely. The evidence shows, however, that only one co-worker wrote and entered a conflict letter into his personnel file.

- In the OI report, reference is made to the fact that FENOC's counsel was so troubled by the ex-employee contacting a current FENOC employee before his deposition that she filed a motion for protection of three employees scheduled to be deposed. The OI report goes on to state: "The motion was denied." This is simply not true. In fact, this statement is directly contrary to the only testimony offered on this subject by a FENOC employee who told the OI investigator that the motion had been granted to protect him.[2] Document B4. This type of error in the report can mislead a reader to believe that the company attorney's concerns about contact between FENOC employees and the opposing litigant were misplaced and a judge's ruling proves it. This statement was not lost on NRC readers of the report who were subsequently called upon to make judgments about this case. In notes from a January 13, 1999, Enforcement Panel discussion, reference is made to the fact that the judge denied the FENOC counsel's request. Document F3.

FENOC believes that the number of statements cited as fact in the OI report based solely on the Supervisor's testimony reflect an inappropriate acceptance of the Supervisor's account of the facts and greatly influence the reader of the report to the detriment of FENOC.[3] FENOC believes a fair reading of the record and appropriate weight on testimony yields a different conclusion. FENOC recognizes of course that one opportunity was lost when the company decided to forego a presentation at a predecisional enforcement conference in favor of a written response to the NRC. FENOC made the decision largely to avoid exacerbating the difficult employment setting that necessarily exists between the RPM and the Supervisor during the pendency of this case. FENOC hopes the NRC would feel compelled to try even harder to judge the two through the other means available. In this Reply and Answer FENOC attempts to assist in this effort.

3. NRC Decision to Take Enforcement Action

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2 The OI investigator apparently reviewed the Department of Labor file and transcripts, but apparently did not check this fact which was to be included in the Report. See Documents A26 and A37.

3 Thus, although evidence from other witnesses is typically summarized in the OI Report as "[the RPM] stated . . .," "[the company attorney] told OI . . .," etc., the Supervisor's version is often not identified as what it is, namely, the testimony of a witness requiring testing and evaluation of its credibility. Instead, it is stated by OI as "fact." See, e.g., OI Report at p. 15.

The fourth factor is the inconsistent record of decision that led to the enforcement decision and the NOV. The letter from J. E. Dyer to Lew Myers dated May 20, 1999, cites two bases for its finding that the RPM discriminated against the Supervisor: "a July 16, 1997 verbal counseling and the placement of a July 17, 1997 memorandum documenting the verbal counseling in the [Supervisor's] section personnel file on July 22, 1997." Notice of Violation and Proposed Imposition of Civil Penalty at p. 1. Each of these conclusions, however, is based on an unreliable record replete with inconsistencies and ambiguities.

The first basis for the violation of 10 CFR 50.7 is the RPM's verbal counseling session with the Supervisor. This is disconcerting because when the Supervisor initially recounted his recollection of the counseling session to the NRC on July 16, 1997, the NRC did not deem the counseling session sufficiently troubling to initiate an investigation. The Allegation Review Board assessing the Supervisor's complaint determined that the matter did not warrant investigation by OI because "no action [had] been taken against the alleger." Document D26. Even after the investigation was completed, the NRC was uncertain about the RPM's intent in counseling the Supervisor, reflected, for example, by the Director, Division of Reactor Safety, in a December 1998 memorandum to the Enforcement and Investigations Officer. Document D48. See also Document H4 (January 1999 Enforcement Panel Worksheet). Moreover, the NRC has since concluded that enforcement action was not warranted against the RPM because of his unfamiliarity with the requirements of 10 CFR 50.7 and the lack of training provided in this area by the company. Despite these discrepancies, the RPM's conversation with the Supervisor now is designated as an independent basis upon which to initiate enforcement action.

The second basis is the memorandum placed in the section file and subsequently removed by the RPM. When the Supervisor first complained about the memorandum to the NRC, five months after it had been placed in his section file, the NRC continued to question whether any action was warranted. Documentation of the Allegation Review Board specifies that two questions had to be answered before OI action could ensue: whether the memorandum constituted disciplinary action by FENOC and whether the memorandum was an adverse employment action in the retaliation context. Documents D31, D33. The record is vague as to when and how these questions were answered and provides no reasons as to why each of these questions apparently was answered in the affirmative. Indeed, the record reflects the only evidence received by the NRC that would permit an affirmative answer to either of these questions was the Supervisor's own views on these critical determinations. Documents E6, E7. Again, notwithstanding these ambiguities, the NRC evidently considered enforcement action necessary.

As demonstrated by these significant examples, before proceeding with enforcement action, the NRC had to address many complex issues by means of a record full of contradictory evidence. To justify the outcome of the OI investigation and the action that has been taken against FENOC, the NRC must have resolved each discrepancy in the record in favor of the Supervisor, a party who has provided inconsistent testimony since the initial complaint was filed with the NRC. FENOC reads the record differently and simply does not understand how this record can be viewed as sufficient to support enforcement.

4. Policy Considerations Against Enforcement Action

The fifth and final factor involves the policy implications that attach to the NRC decision to continue with this enforcement action. This is a case in which absolutely no ill has come to the complainant. The record is void of company retribution against the complainant. FENOC has completed substantial efforts to confirm its belief that an open safety conscious work environment exists at the Perry site. Although there is no finding of intent to discriminate in the OI report or

elsewhere in the record of decision, discrimination must be found for the enforcement to lie. At most, there is the belief of the individual involved that he was discriminated against based on his understanding of what he heard and felt - as interpreted by others.

There is no way a licensee company can avoid this type of problem. Rather it must ask and require its employees - line, supervisory, and management alike - to follow its duly enacted procedures. And, those procedures must pass muster under NRC and other regulatory authority. Here, an attorney advising management was convinced that inappropriate actions were taking place that could have compromised the company's legal strategy in an ongoing, hotly contested case with an ex-employee. The attorney had reason to believe that a specific employee was involved, and asked that employee's boss to remind him of company policy, applicable to all employees, regarding duty owed to the company. The manager carried out the attorney's request, satisfied himself that the individual employee had done nothing wrong, and documented the conversation for his personal records in the section file. When the individual employee took umbrage with the conversation and read into it a wholly different intent on the manager's part, he believed himself to be involved in protected activity and sought NRC support. To reach a decision contrary to the licensee, the NRC investigation had to accept wholesale the complaining employee's views of what occurred, and to ignore all contradictory evidence. It also had to rely on personnel guidance from a former manager that was not adopted as company policy in order to find that the memorandum to the section file constituted a reprimand despite its neutral words and tone. Only one person testified that the memorandum constituted disciplinary action - the complainant. Even the former manager did not see the counseling memorandum as disciplinary under his informal guidance, and the evidence was uncontroverted that there was no formal company policy covering this situation. Again, there is no way a licensee can avoid this problem. In essence, the NRC appears to have concluded that so long as a complainant subjectively believes that he is being discriminated against, it does not matter what contrary testimony, however overwhelming, is submitted by others. Under this standard it is impossible for a company to protect itself against charges similar to those made in this case.

5. Conclusion

The need for protection of all employees who see and report wrongdoing of any licensee in this industry is unquestioned. This legitimate need for protection does not support, however, unnecessarily penalizing licensees who have abided by procedures and have not engaged in retribution against an employee for protected activities even if the employee believes differently. That has occurred in this case. FENOC asks for the dismissal of the Notice of Violation. In the alternative, FENOC requests full remission of the proposed penalty.