

U.S. Department of Labor
Office of Administrative Law Judges
101 N.E. Third Avenue, Suite 500
Ft. Lauderdale, FL 33301

DATE: October 30, 1992

CASE NOS. 91-ERA-1

91-ERA-11

In the Matter of:

ALLEN MOSBAUGH

Complainant

v.

GEORGIA POWER COMPANY

Respondent

Appearances:

Michael D. Kohn, Stephen M. Kohn,
and Sandra Michaels, Esq.

For the Complainant

James E. Joiner and Jesse P.

Schaudies, Esq.

For the Respondent

Daryl Shapiro, Esq.

For the Nuclear Regulatory Commission

Before: ROBERT M. GLENNON

Administrative Law Judge

RECOMMENDED DECISION AND ORDER

These proceedings arise under the Energy Reorganization Act of 1974, as amended, 42 U.S.C. 5801 *et seq.* ("ERA" or "the Act"), and its implementing regulations which are found at 29 CFR Part 24. The Act prohibits a covered employer from discriminating against an employee because that employee has engaged in activity protected by Section 5851 of the Act, 42 U.S.C. 5851.

Employee complaints of prohibited discrimination under that law are adjudicated by the Secretary of Labor under procedures specified at 29 CFR 24.1 *et seq.*

Allen Mosbaugh, Complainant, was discharged from his employment with the Georgia Power Company, Respondent, on October 11, 1990. It is his contention in these proceedings that his discharge and other adverse actions taken by the company constituted retaliation for his having engaged in protected activity while he was its employee. The Georgia Power Company is a licensee of the Nuclear Regulatory Commission and is an employer subject to the employee protection provisions of Section 5851 of the Act.

1. Procedural Background. The events which are the subject of these proceedings have been the subject of three Section 5851 complaints. The first of those complaints was filed on June 4, 1990, and amended June 23, 1990. That complaint charged that Mr. Mosbaugh had been removed from certain positions and assignments within the company, transferred to unsuitable assignments, and otherwise adversely treated for engaging in specified acts of protected activity. After an administrative level investigation, the District Director of the Department of Labor's Wage and Hour Division ("District Director") advised Mosbaugh that unlawful discrimination had not been established. Mosbaugh's appeal of that determination was assigned as Case No. 90-ERA-58, and set in process for a *de novo* hearing by an administrative law judge. Extensive pre-trial discovery was conducted by the parties, but, on February 19, 1991, Complainant filed a notice of voluntary dismissal of the complaint.

Mosbaugh had then filed a second Department of Labor ("DOL") complaint, dated August 20, 1991, asserting additional counts of discriminatory action, an alleged downgrading of Mosbaugh's performance evaluation and taking away of his company car.

In this instance also, the District Director investigated the complaint and determined, on September 21, 1990, that unlawful discrimination had not been established. Complainant's appeal of that determination, docketed as Case No. 91-ERA-1, is in issue in these proceedings before me.

Mosbaugh filed the third DOL Section 5851 complaint on September 19, 1991, amending it on October 17, 1990, asserting that he had been barred from the worksite on September 15, 1990, and then discharged on October 11, 1990, in violation of Section 5851. The District Director conducted an additional investigation following that complaint and issued a determination on November 16, 1990 finding that Mosbaugh

had engaged in relevant protected activity, and that the Georgia Power Company had retaliated unlawfully. Georgia Power Company's appeal of that determination, docketed as Case No. 91-ERA-11, is in issue in these proceedings before me.

[Page 3]

The complaints in Cases Nos. 91-ERA-1 and 91-ERA-11 were consolidated for hearing by order of Deputy Chief Judge Vittone on February 25, 1991. Following a series of telephone pre-trial conferences between the undersigned judge and the parties, Complainant moved, on May 16, 1991, for a summary judgement on the merits of the issue of liability. Complainant's Motion was supported by extensive supporting documentary evidence. Respondent replied to the Motion on July 26, 1991, with extensive assertions of fact, in affidavit and other form. Complainant's motion for summary judgement was denied by my order entered on August 9, 1991.

A second series of formal and informal pre-trial conferences took place thereafter, and the parties proceeded to conclude pre-trial discovery and exchange of documents. A formal hearing on the merits of the complaints was conducted on March 10, 11, 12, and 13, 1992 at Atlanta, Georgia. Post hearing briefs were filed by Complainant and by Respondent, and each party filed a reply brief. In the following recommended decision and order, these abbreviated references will be used: CX for Complainant's exhibits; RX for Respondent's exhibits; and TR for the transcript of the March 1992 hearing.

2. Mosbaugh's Audio Tapes as Evidence. A significantly complicating factor in the process of litigating these complaints has been the existence and control over 277 audio cassette tape recordings secretly, privately recorded by Mr. Mosbaugh between February and August 1991 at the workplace during his employment. As far as the Respondent is concerned, the existence of these tape recordings came to light on September 11, 1990 in the course of Respondent's deposition of Mosbaugh in preparation for trial in the first DOL complaint case, Case No. 90-ERA-58.

When Respondent Georgia Power Company demanded access to the audio tapes in Mosbaugh's possession at his September 11, 1990 deposition, as part of the pre-trial discovery process in Case No. 90-ERA-58, and after Judge Gilday on September 12, 1990 directed Mosbaugh to produce the tapes, counsel for Mosbaugh advised the Nuclear Regulatory Commission of the existence of the 277 tape recordings. On September 13, 1990, the Nuclear Regulatory Commission became an Intervening Party in Case No. 90-ERA-58 and moved for a suspension of discovery. In its September 13th Motion, the Nuclear Regulatory Commission stated:

The Complainant has agreed to provide these recordings to the NRC in their entirety. The NRC will expeditiously review these materials and provide this Tribunal with a detailed statement describing the number and nature of the recordings, if any, which it wishes this Tribunal to protect from discovery. Accordingly, the NRC respectfully requests this Tribunal to stay any orders compelling discovery to the extent that the Complainant not be compelled to produce for discovery to Respondent various tape recordings of conversations regarding incidents involving the Vogtle Electric Power Station, owned by the Georgia Power Company.

[Page 4]

Judge Gilday granted the NRC's request, and directed Mosbaugh to deliver all of the tape recordings to the NRC. Order, Judge Gilday, dated September 13, 1990, Case No. 90-ERA-58.

In February 1991, the NRC returned 201 of the 277 audio tapes to Mr. Mosbaugh, but retained possession of the other 76 tapes. On October 22, 1991, following a series of pre-trial conference discussions with Complainant and Respondent, the undersigned judge wrote to the Solicitor, Nuclear Regulatory Commission, formally inquiring about the status of the audio tapes in its possession. The Solicitor, on October 31, 1991, responded that the tapes were still reviewed by the Commission.

In subsequent pre-trial conference with Complainant and Respondent, I directed the parties to complete preparation for trial on the assumption that the 76 audio tapes in the possession of the NRC would not be made available for discovery at trial. The parties were directed to complete any necessary discovery, with Complainant providing all of the tapes in his possession to the Respondent for copying. A period of time was provided for Respondent to copy and review the tapes, and the cases proceeded to trial in March 1992.

Respondent stated continuing objections to going forward with trial in these proceedings without having access to all of the audio tapes made by Mosbaugh. With the understanding that Complainant also did not have access to all of the tapes, I concluded that neither party would be unduly prejudiced by being required to go to trial without access to the 76 audio tapes retained by the NRC. I concluded that, were any real question of fairness or due process regarding these tapes to become evident during trial, that problem could then be addressed in specific terms. As will be evident in the discussion that follows, I conclude that access to the 76 tapes was not required for a fair and complete trial of the facts and issues in these proceedings.

3. *The Factual Background.* Allen Mosbaugh is highly educated and experienced in chemical and nuclear engineering. He has a Master of Science degree in chemical and nuclear engineering from the University of Cincinnati, and has completed the course work necessary for a doctorate in that field. His work in nuclear power plants began in 1974 with the Babcock & Wilcox Company. He later worked for 6 years in start-up and operation of a nuclear power plant for the Cincinnati Gas & Electric Company. In 1984 he was employed by Georgia Power Company as a superintendent of engineering liaison at its Vogtle Electric Generating Plant ("Plant Vogtle") during its construction and pre-operational stage. In this work he supervised a staff of about 30 engineers in performing pre-operational testing of the first of two nuclear reactors ("Unit 1") at Plant Vogtle.

In the summer of 1986 he was promoted to be superintendent of engineering services, and later that year to be assistant plant support manager for Plant Vogtle, supervising all engineering personnel, the quality control inspection staff, and plant security personnel. At this point, more than 400 employees reported to Mosbaugh. That Mosbaugh

[Page 5]

did well in his work can be seen in the comments given in Mosbaugh's annual performance appraisal in December 1987 by Tom Greene, Plant Support Manager at Plant Vogtle. In the supervisor's comment item in the appraisal form regarding "future growth possibilities," Greene stated:

With an SRO and improvements in his communications skills, Allen can progress to Plant Manager or Plant Support Manager. CX 6

The term SRO means "Senior Reactor Operator". A person is granted an SRO license upon completion of a special SRO schooling process that takes about 15 months. TR 80

In January 1989, following a reorganization, Mosbaugh's title was changed to engineering support manager, a promotion. Then, in March 1989, when Tom Greene was assigned to attend Georgia Power Company's SRO school, Mosbaugh was assigned to take over Greene's position on an acting basis. The official organization chart for Plant Vogtle during that time, dated October 10, 1989, showed the position as "Assistant General Manager Plant Support." The designation "A.L. Mosbaugh (Acting)" is shown for that position. CX 12 In this position in the Plant Vogtle scheme, Mosbaugh reported directly to the plant's General Manager, then George Bockhold. Mosbaugh continued in this position until early May 1990, when Tom Greene returned to Plant

Vogtle from his SRO school assignment and reoccupied his prior position. Mosbaugh's assignments from that point on are discussed below.

The Georgia Power Company is a private, investor-owned electric utility. Together with several co-owners, it owns and operates two nuclear power plants, Plant Vogtle in Waynesboro, Georgia, and Plant Hatch in Baxley, Georgia. Georgia Power Company acts as the operator and licensee for both nuclear power plants. It is wholly-owned subsidiary of the Southern Company, Mississippi Power and Savannah Electric Companies. In 1988 The Southern Company formed a new affiliate, Southern Nuclear Operating Company ("SONOPCO" or "Southern Nuclear") to reorganize and integrate the off-site management functions of Plant Vogtle, Plant Hatch, and Plant Farley, a nuclear power plant owned and operated by the Alabama Power Company in Dothan, Alabama. TR 88-100, Resp. Brief, p. 8

Plant Vogtle is a nuclear generating station producing 1,100 megawatts of electrical power from each of two reactors. Georgia Power Company describes it as a very modern plant designed and constructed after the lessons of the Three Mile Island events, with close regulatory control being exercised over its operations by the Nuclear Regulatory Commission. The first of its reactors went into commercial service in May 1987. Unit 2 did so in May 1989.

[Page 6]

Beginning in June 1988, Plant Vogtle's General Manager Bockhold reported to an off-site corporate vice president, Ken McCoy, located at the SONOPCO headquarters in Birmingham, Alabama. McCoy, in turn, reported to a senior vice president, George Hairston, and an executive vice president, Pat McDonald, also at the SONOPCO headquarters. McDonald reported to Georgia Power Company president and chief operating officer A.W. Dahlberg, whose office is in Atlanta. Prior to 1988, Plant Vogtle's operations were supervised by corporate executives located in the Atlanta corporate headquarters. TR 101

4. *Chronology of Mosbaugh's "Protected Activity"*. Beginning with the introduction of SONOPCO into the corporate reporting chain of command, Mosbaugh felt a change from a "conservative" to a more risk-taking" attitude in decision-making in the operation of Plant Vogtle during refueling outages. He stated that following generalized comparison of those attitudes.

Well, in the operation of the plant there's lots of manipulations that have to be done, there's lots and lots of redundant features, there's lots of requirements, and you always get to a point where your schedule may be banging up against

the requirement, and the requirement may be stopping you from moving forward, and you may have to make some decisions, and sometimes those decisions are fairly black and white, and sometimes those decisions require some interpretation.

Risk taking and nonconservative decision-making means that you may interpret those issues in your favor, in favor of schedule as opposed to safety, and of course if you go so far as to interpret those requirements in violation of the requirements so that the schedule can be met, you know, that's risk taking at its worst because those requirements have been set up by the Nuclear Regulatory Commission to assure safety, they are part of the licensing and safety basis of the plant. They are the requirements that you have to operate to. TR 108, 109

Mosbaugh expressed a particular concern for strict observance of "reportability" requirements, a variety of requirements specified by the Nuclear Regulatory Commission in the Code of Federal Regulations ("CFR") for reporting operating events or security events related to plant safety. Mosbaugh stated:

The reason why the NRC does that is they want to know what's going on at these nuclear power plants, and they also have a whole division I believe in Washington which is called AEOD, they analyze operating events.

This is their data base for determining trends, for determining to some degree the performance of the plants. If a plant is making lots and lots of these reports that plant may be viewed as a problem. If it is not making any of these reports, it might more be considered to be a better, well-run plant. TR 110

[Page 7]

On September 12, 1989 John Aufdenkampe, then the manager for technical support, who reported directly to Mosbaugh, brought a "reportability" concern to his attention. In reviewing certain documents for an analysis expected to be routine, Aufdenkampe's staff came upon what they believed was an "event" in October 1988 that should have been reported to the NRC, as a violation of the "Technical Specifications" ("Tech Specs") governing Plant Vogtle's operations. TR 111 The "Technical Specifications" are very specific rules governing the operation of a nuclear plant, such as Plant Vogtle, to which exact, verbatim compliance is required by the NRC. Mosbaugh told Aufdenkampe to raise the "reportability" concern at Plant Vogtle's "morning meeting" that day. The morning meeting was a routine daily conference of senior managers, sometimes including the NRC personnel, meeting to discuss overnight

transactions and recent events. When Aufdenkampe did raise the issue, a manager from the "Operations" side of the conference table spoke up and said: "Watch what you're saying," in a loud, irritated, challenging voice. TR 119 Plant Manager Bockhold and the senior "Operations" manager, Skip Kitchens, were not at that meeting.

That afternoon, when Mosbaugh brought the matter to the attention of Bockhold, Bockhold called a meeting with his two senior managers for "Support" and "Operations," Mosbaugh and Kitchens. At that meeting, Kitchens said he believed no violation of the Tech Specs had occurred, but when Mosbaugh held to his position, Kitchens agreed to write a "deficiency card" which would bring the matter formally before the Plant Review Board ("PRB").

The PRB is a staff committee of senior department managers, or senior supervisory staff officials within the departments, established pursuant to certain provisions of the Tech Specs to review a wide range of issues arising at the plant, "to advise the General Manager ... on all matters related to nuclear responsibilities and record keeping rules are specified at Item 6.4.1 through Item 6.4.8, Administrative Controls, of the Tech Specs for Plant Vogtle. CX 13, TR 102 In mid-1989, the composition of the PRB was changed to place Vogtle's most experienced managers on the PRB, replacing supervisory level personnel who had been performing that function. TR 103 Kitchens, the plant's top manager for "Operations," was named PRB chairman, and Mosbaugh, the acting top manager for "Support," was named vice chairman.

The operational issue presented, when the "reportability" concern was raised, was whether certain "dilution valves" had been opened during a "mid-loop" interval during a nuclear refueling outage in October 1988. The Tech Specs prohibit opening those valves that allow demineralized water to flow into the reactor vessel's coolant during a "mid-loop" interval. The "mid-loop" is when the fission control rods have been fully employed in shutting down the nuclear reactor and when the coolant, augmented by boron

[Page 8]

which inhibits fission, is at about 1/3 the normal vessel volume. Since the control rods have already been fully employed in this situation, borated coolant is needed to prevent a fission reaction in the reactor vessel. Opening the "dilution valves," for the addition of other chemicals or any other purpose, can result in the addition of demineralized water to the borated coolant in the vessel, thereby diminishing the controlling capability of the borated coolant. Mosbaugh explains that the Tech Specs require the dilution valves to be locked shut at all times during the "mid-loop" interval because the nuclear containment vessel is in a vulnerable, "breached" condition during a refueling outage.

Mosbaugh believed that the opening of these valves at "mid-loop" in order to add additional chemicals, as had been done in the October 1988 refueling outage, had put the plant in an "unanalyzed" and therefore unsafe condition. The condition was "unanalyzed," Mosbaugh contended, because there had been no formal technical analysis previously completed to show what reactions could occur within the reactor vessel under these conditions. Tr 114-9, CX 15

On September 15, 1989, two days after the meeting with Bockhold and Mosbaugh, Kitchens sent a memorandum to Bockhold stating his position that no violation of the Tech Specs had occurred, asserting, in part, that the reactor coolant system had not been at the "mid-loop" condition when the dilution valves were opened. CX 14 It was clear at this time that the dilution valves had been opened during a particular interval in the 1988 outage for the addition of hydrogen peroxide, and the unborated water had flowed into the reactor vessel. It was also clear that, if the event constituted a violation of the Tech Specs, the event should have been reported to the NRC. Mosbaugh believed that Kitchens' September 15, 1989 memorandum was "false" in asserting that the coolant in the reactor vessel had not been at the "mid-loop" condition when the hydrogen peroxide was added, because he had reviewed the control logs. TR 125 He testified:

...I continued to gather the facts on what had happened, and so I got control logs and shift supervisor logs and so forth out of the main control room, and I reviewed back to the 1988 period when this had happened, and it was clearly marked what the reactor coolant system levels were, and what I found out is these valves had been opened on four different occasions.

The first two occasions that they had been opened on, the reactor coolant system was not technically at mid-loop. On the second two occasions that they had been opened, the reactor coolant system was at mid-loop as indicated by log entries in the main control room log. TR 123

At about this time, Mosbaugh heard rumors that the operations staff had refused to open the dilution valves during the interval in issue, that they had been overruled by their management, and that Skip Kitchens himself had opened the valves. Tr 126

[Page 9]

The Plant Review Board proceeded to consider this "dilution valve" incident in the course of several meetings between September 13 and late October 1989. The sessions included a confrontation between Mosbaugh and Kitchens about whether the vessel had been at "mid-loop." It was concluded, initially, that the matter should be referred to the

outside contractor, Westinghouse Company, for a technical analysis, as well to SONOPCO headquarters in Birmingham for an interpretation. When the responses came back to the PRB, with SONOPCO presenting an ambiguous answer and Westinghouse concluding that the event would not have gone beyond the control of the operators at the site, the PRB decided that since the Tech Specs had not been violated and there had been no safety threat, no NRC report was required. TR 131 Mosbaugh concurred in that decision of the PRB at that time. TR 131

After the PRB vote, Mosbaugh continued to review the documents and reexamine the concepts behind the NRC's reporting requirements. He eventually concluded, at about the beginning of December 1989, that he had been wrong to rely on the SONOPCO interpretation and that a violation of the Tech Specs had occurred in the October 1988 outage. At about that time, he also had a "flashing" recollection of a meeting in late 1988 in which he believed he heard Skip Kitchens say he had "used his SRO license" that day. Mosbaugh now believed that the recalled comment was proof that Kitchens had deliberately violated the Tech Specs in the October 1988 outage. Mosbaugh stated:

...with that it occurred to me that what I had heard was true, it fit together, and that Skip had opened these valves, or authorized or ordered the opening of these valves, and we had a tech spec violation, but now it appeared that this tech spec violation was intentionally violated, and so the nature of my concern changed to that of a tech spec violation and just being reportable to an intentional violation of technical specifications which is criminal conduct. TR 137

This was the first time in his career that Mosbaugh had "firsthand evidence" of a willful violation of technical specifications, and he had never before been an "allegor" of such conduct to the NRC. TR 139 Over the next several weeks in December 1989, Mosbaugh drafted a detailed summary of his evidence of violation, telling no one about it but his wife. When the document was completed, he mailed it to the NRC anonymously, taking very special precautions to avoid having the document traced back to him. TR 142, CX 15 He believes he mailed it on January 7, 1990. He later learned that the NRC had logged it as received on January 9, 1990.

NRC staff proceeded with a prompt on-site investigation of the October 1988 valve incident, questioning people at Plant Vogtle and gathering relevant documents. TR 150 Mosbaugh believed that management's attitude toward him became changed after this time, and he feared that his position in the company was threatened. It was in the succeeding weeks that Mosbaugh would decide to begin tape recording conversations on the job at Plan Vogtle.

[Page 10]

Mosbaugh was called to a meeting with Bockhold and Kitchens in mid-to-late January 1990, probably on January 19th, to discuss such things as teamwork, personal faults, "backstabbing," etc. Some days later, on January 29th, Bockhold came to Mosbaugh's office and discussed the NRC investigation in a manner that Mosbaugh believed showed Mosbaugh was suspected of being the "allegor" to the NRC. TR 158 On February 7, in a meeting with Bockhold to discuss the approaching reorganization at Plant Vogtle, Mosbaugh noted Bockhold as emphasizing "conforming" in the company, or else, "you need to get out." TR 162 There also was more discussion of the NRC investigation, with Bockhold stating that when the PRB members were to be interviewed by the NRC they could choose to be represented by the company attorney. It was understood that the investigation was being done by the NRC's Office of Investigations ("NRC-OI"), an office that normally investigates the more serious, possibly criminal violations. TR 156 Later that day, Mosbaugh overheard Bockhold talking to McCoy on the telephone saying that "Allen and the other managers" were to be interviewed by the NRC. It seemed strange to Mosbaugh, and it concerned him, that his name was singled out in this context, since he had played no role in the October 1988 dilution valve incident itself. TR 165

When Mosbaugh went to his NRC interview on February 8, 1990, he decided to have the company attorney appear there with him as his attorney. He feared that doing otherwise would make him stand out too conspicuously in these circumstances. TR 166 In general, he felt intimidated by the attorney's presence at the interview, but did reveal to the investigators rumors about the 1988 incident he felt were significant. TR 170 At the NRC interview, he did name 2 individuals from whom he had heard rumors: (1) a rumor that some "operations" staff personnel had not agreed with the decision to open the dilution valves, and (2) a rumor that it was Skip Kitchens who had opened the valves. He did not -- on the advice of the company counsel, as he recalls it -- tell them he had recalled hearing Kitchens talk about "using his SRO license" at that time. TR 169 Later, in May 1990, after Mosbaugh had contacted Attorney Michael Cohn in these matters, Mosbaugh prepared a memorandum that Attorney Cohn delivered to the NRC-OI investigator in June 1990, stating that, on advice of the company counsel, he had neglected in that interview to mention his hearing Skip Kitchens say he had "used his SRO license" at about the time of the dilution valve incident. TR 171, CX 46

In the early months of 1990, Mosbaugh also was vigorously presenting opposition within the company at Plant Vogtle against putting into service a special experimental filtration device, the FAVA filter, named for its vendor, George Fava. In early 1989, the quality assurance staff had caused it to be removed from service at Plant Vogtle

because its construction did not meet NRC standards and had been improperly procured. TR 176 In late 1989 and early 1990, the operations side of Plant Vogtle pushed to have the PRB approve its use. Mosbaugh carefully reviewed the proposal and, based on his findings and his familiarity with the design, testing components, etc., strongly opposed its use at Plant Vogtle. TR 177 On February 8, 1990, the PRB voted, 6 to 1 against Mosbaugh's position. TR 179 He was upset by the result. He testified:

[Page 11]

I was appalled, I was disgusted -- as a nuclear professional I was disgusted and appalled, and I was a little shocked that some of the people that I thought knew better and had talked to me on the side that they knew that this was in violation, I was surprised that they had voted in favor of it. TR 181

A week later, Mosbaugh filed a formal "Quality Concern" about the PRB decision with the Plant Vogtle Quality Concerns Coordinator, Bill Lyons. CX 22 This memo to Lyons was a detailed, 15-page memorandum discussing the evaluation of the issue. Mosbaugh later supplemented that memorandum in other detailed and documented memoranda dated March 16, June 1, and June 11, 1990. CX 23, 24

A few days after Mosbaugh's first FAVA memorandum to him, Lyons, appearing "somewhat upset," told Mosbaugh that Bockhold had take the matter from Lyons and would handle it himself. TR 182. This fact, in context with other matters taking place, such as the NRC-OI investigation, made Mosbaugh feel an atmosphere of intimidation affecting others as well as himself. TR 184 He felt there was an atmosphere in which employees at plant Vogtle felt intimidated and feared retribution for giving opinions contrary to management pressure. TR 188 On February 20, 1990, Bockhold directed that the FAVA unit be kept out of service, and directed Mosbaugh personally to continue the investigation of the matter. Later a corporate engineering audit manager was assigned to work with Mosbaugh on this issue. TR 648, DX 71 The NRC eventually was told about the matter and was asked for its evaluation. It did review the data related to use of the FAVA filter, and advised Mccoy it had no objection to its use as proposed. TR 541 Thereafter, use of the FAVA filter, with modifications, was approved by the PRB at a scheduled meeting with FAVA on its agenda. Mosbaugh did not attend that meeting of the PRB because of a family matter needing his attention at the scheduled time. TR 650

Mosbaugh filed two additional anonymous charges with the NRC in late February and early March 1990, CX 35, 36, concerning what he believed were additional safety violations by Plant Vogtle management, violations showing what he believed were

"blatant disregard" for compliance with governing safety requirements regulated by the NRC. TR 219 - 222

In the aftermath of a March 20, 1990 "Site Area Emergency" at Plant Vogtle, Mosbaugh became appalled and disgusted when a SRO-licensed supervisor spoke to a staff meeting seemingly suggesting intentional violations of the Tech Specs if necessary to conclude a refueling outage more promptly. TR 214 At the time, Mosbaugh was the late-night plant duty manager, and he heard the supervisor speak to the staff.

Mosbaugh testified:

And in this meeting the shift supervisor -- this is the SRO-licensed person on shift responsible for control room operations addressing a group of around twenty people that would be working for him from various departments for the

[Page 12]

night, for the evening shift, he said to that audience, he said: "We've got a lot of work to do," he said, "It can be done if you take the LERs" and then there was laughter.

Now my interpretation of what "take the LERs" is, an LER is the 30-day report that you have to file with the NRC after you violate a tech spec, so he meant that we could meet the schedule, get on with the outage, if we could violate tech specs and then just write the 30-day reports.

TR 213

Mosbaugh jotted down the quotation on an envelope and then, feeling that his note on an envelope was meager documentation for a serious problem, he decided to intensify his secret tape recording activity. TR 213

The March 20, 1990 emergency began with a delivery tank truck crashing into an electric utility pole at the plant site, causing loss of all electrical power from off-site sources. Normally, the plant has 4 independent sources of electrical power, 2 off-site and 2 on-site. However, two of those sources, one off-site and the other on-site, were inoperative, being serviced. When the truck crash occurred, only one on-site power source remained, a large diesel generator. An additional complicating factor was that the Unit 1 reactor was undergoing a refueling outage. The operative on-site diesel generator did not function properly. As Mosbaugh described it:

The diesel started and it ran for approximately a minute and twenty seconds, and then it tripped off line. At that point the containment was open, the reactor vessel was breached, and the station was in a total blackout, no electrical power safety-related of any kind.

The coolant in the reactor vessel began to heat up, and the diesel was attempted to be restarted again. It started and again ran for a brief period of time and then tripped again, and the blackout continued for approximately 36 minutes until they were able to get the diesel started and get it to continue running. TR 208
Mosbaugh believed that had the electrical blackout continued for some period of time, a catastrophic nuclear accident could have occurred. TR 210

Following the March 20, 1990 Site Area Emergency, Georgia Power Company was required by the Nuclear Regulatory Commission to submit a formal Confirmation of Action Letter ("COAL") to describe its corrective actions in justification for permission to return the Unit 1 reactor to power operation. On April 9, 1990, SONOPCO senior vice president Hairston submitted that COAL to the NRC. CX 40 Mosbaugh obtained a copy of the COAL the next day, and concluded that 2 sections of the

[Page 13]

letter contained false statements, statements regarding the results of start-up testing of the on-site back-up diesel generators following the March 20 event, and statements regarding the monitored dew point air quality in the generators' air systems. TR 258

Although the COAL stated that, since the March 20 event, the generators had been test-started 18 times and 19 times, respectively, without failures or problems, Mosbaugh believed there had been problems and failures, and he knew that the reliability of these generators was a crucial consideration in deciding whether Unit 1 should be returned to power operation. TR 259 He also knew there had historically been problems controlling the dew point in the air system for the diesel generators. TR 261 On April 10, 1990, Mosbaugh sent a memorandum, with supporting data from an engineer, to Bockhold describing the problems that had been encountered with the diesels' air quality system. TR 263, CX 41 In addition, Mosbaugh then proceeded to obtain data from the control room regarding the diesels' start-up testing referred to in the COAL. When he had compiled the data and reviewed it, he believed that the post-March 20 testing had shown failures and problems. He reported those findings to his management that the COAL had contained "incorrect" and "false" statements. He testified:

With regard to my concerns about this statement being false about the starts, I raised it, I personally raised it to responsible and high-level management informing them that I thought it was incorrect, that it was false. TR 276

Nevertheless, on April 19, 1990, the Licensee Event Report ("LER") sent to the NRC by SONOPCO's Hairston regarding the March 20 emergency, a report specifically

required within 30 days by standing, codified regulations (10 CFR 50.73), repeated the incorrect post-March 20 generator start-up test results. CX 42 Mosbaugh had reviewed drafts of the LER and had reported the incorrect data to management. He testified:

Q. When you noticed that in the draft LER, did you report that to anyone at Georgia Power?

A. Yes, I did. That was what, you know, I had mentioned before. Yes, I reported this to senior and responsible management that this information was false, and this information was materially false.

Q. Now, did you make that report to the best of your knowledge before or after Mr. Hairston signed this document?

A. I absolutely reported it to them before this document was signed.

TR 269

[Page 14]

When Mosbaugh later saw the LER actually sent to the NRC, he felt concerned because. "It had been signed out false." TR 270 He sent another memorandum to Bockhold, dated April 30, 1990, enclosing a tabulation of the actual results from the data he had gathered. CX 43 He then proceeded to work with his staff in drafting a revision correcting the test data statement and, on May 8, 1990, the PRB approved the revised LR to the NRC correcting the prior version as proposed by Mosbaugh and his staff. TR 273

Other things were happening during April and May 1990 that bothered Mosbaugh concerning his position in the company. On April 27, 1990, he was called at work by Tom Greene, who was then at home; Greene wanted a meeting, as Mosbaugh stated it, to discuss Mosbaugh's "turning over my job responsibilities" to Greene. This was, Mosbaugh stated:

... the first I knew that any decisions had been made, and my supervisor George Bockhold wasn't communicating with me about it, I was finding out by accident from Tom Greene.

Tom Greene was surprised too. Tom Greene said, you know, like "George hasn't talked to you?" and then he says "Well, you need to go talk to George," and he also indicated that George had been talking to other people about it. My interpretation was he meant other people than the conversation between Greene and Bockhold. TR 279

At a PRB meeting on May 10, two days after the PRB had approved the corrected LER, Mosbaugh, then vice-chairman of the PRB and acting as chairman of the meeting,

initiated an action to correct the prior COAL sent to the NRC regarding the March 20 emergency event. Mosbaugh testified:

I was acting as the chairman of the PRB in my vice chairman capacity, and so I initiated an action item as PRB chairman to Mr. Bockhold to determine how the COA letter was, the false information in the COA letter was to be corrected as well, and so I think on May 10, the PRB issued an action item to Bockhold to correct the COA. TR 280

The next day, May 11, Mosbaugh received a copy of a memorandum dated May 10 from Bockhold to all department managers at Plant Vogtle, advising that Tom Greene had been designated a member and vice chairman of the PRB, relieving Mosbaugh, effective May 11. TR 280, CX 44 Mosbaugh believed he should have been retained on the PRB, even with Greene's return to Plant Vogtle from SRO school, that his participation could have been used in a wide variety of areas on the PRB. He felt as though he had been placed in a "limbo" status. TR 282

On May 8th, SONOPCO's McCoy had come to Mosbaugh's office, discussing the prospects of a job opportunity outside Georgia Power Company. Mosbaugh described the discussion:

[Page 15]

... he came in and said that Mr. Hairston had made some statement to him and that up at TVA there is a man up there by the name of Oliver Kingsley who used to be a Southern Company employee, that Mr. Kingsley was looking for some good managers, good experienced managers to come up to TVA and work at Watts Bar, and Mr. Hairston had mentioned this to Mr. McCoy, and Mr. McCoy was coming to me and wanting to know if he could grease the skids for me to leave my employment with Georgia Power and hire on with TVA. TR 273

This was the first time Mosbaugh had had a manager in his own employer organization "try to offer me employment at a competitor's company or plant." TR 274

Earlier in the day, on May 8th, Mosbaugh had been in a meeting with other managers at Plant Vogtle when he recalled McCoy's telling the group that he and the other SONOPCO vice presidents had been called to Washington by the NRC and, as Mosbaugh recalled:

... they had in Mr. McCoy's words been taken out back to the woodshed. . .in this meeting the NRC had said that Vogtle was cowboy, and cavalier and cocky, we didn't follow procedure, and lots of negative things... TR 274, 275

Mosbaugh filed his first whistleblower complaint with the Department of Labor, because of his removal from the PRB, on June 6, 1990, and a week later signed a "confidentiality agreement" with the NRC investigator dealing with Plant Vogtle issues, Larry Robinson. TR 286, CX 45 Thereafter, over the course of several months, Mosbaugh met with Robinson on 4 occasions in the evening for 4 or 5 hours to discuss these issues, giving sworn testimony on 2 of those occasions. TR 287 They also had telephone discussions once or twice a week over the course of the summer. During these meetings, Mosbaugh presented a number of very detailed written allegations, with documents, regarding violations he had noted in the prior several months of his work at Plant Vogtle. He did not at these meetings disclose to Robinson that he had been secretly recording conversations at the plant. Mosbaugh testified that he was fearful that word would get out, and that his gathering of documentation of his allegations could be stopped. He continued with his audio tape recording activities during this period. TR 289, 290

On June 19, Bockhold had a meeting with Mosbaugh together with on-site resident NRC inspector John Rogge. TR 412 Bockhold stated that in light of the DOL complaint he wanted to know all of Mosbaugh's quality concerns. It was agreed that Mosbaugh would detail his concerns to Lee Glenn, the Atlanta corporate level manager for "quality concerns," whose job was to deal with the broader issues any employee in the company might raise. TR 292, 413 Mosbaugh then did meet with Glenn over the next few weeks, meeting on at least 2 occasions, TR 413, telling him about the problems and issues he

[Page 16]

had dealt with in the prior months. Glenn took extensive notes. When pressed, Glenn told Mosbaugh his data would be sent to the law firm representing Georgia Power in the whistleblower complaint case. TR 294

On July 6, 1990, Mosbaugh received a memorandum from Bockhold discussing the need for Mosbaugh to tell either the company or the NRC about his safety concerns. Mosbaugh regarded the memorandum as threatening. Mosbaugh replied with a memorandum dated July 13, 1990. TR 296, CX 47 Mosbaugh's memorandum, in essence, stated (1) that he had theretofore always stated his safety concerns through normal channels; (2) that the company had not responded to those concerns with timely and appropriate corrective actions; (3) that the company instead had taken adverse employment actions against him; (4) that internal processes to deal with his safety concerns had not been effective; (5) that he therefore was working with the NRC to pursue his concerns; and (6) that:

Under no circumstance do I intend to disobey a direct order from my supervision. If you have any problem with my working with the NRC or would like me to do otherwise, please let me know.

CX 47

At some point after he gave sworn confidential testimony to the NRC about his allegations in mid-July 1990, Mosbaugh learned that a special operational safety inspection ("051") would be conducted by the NRC. Subsequently, in August 1990, a team of NRC inspectors conducted a 2-week inspection at Plant Vogtle. Mosbaugh believed that Georgia Power suspected Mosbaugh was responsible for causing the OSI investigation. TR 298 Among other things, Mosbaugh was not invited to a meeting of the Plant Vogtle managers planning preparation for the inspection. TR 298 At another meeting during this period of time, Mosbaugh heard, he testified, McCoy state, "The OSI is here, the inspection is here because of some immature behavior on the part of an employee or employee allegor." Mosbaugh said he knew McCoy was talking about Mosbaugh. TR 299 At the OSI's exit interview following its inspection, Mosbaugh observed SONOPCO's vice president McDonald speak up, showing an "upset" demeanor because an issue of accuracy of information was raised at that interview. TR 301

On August 9, 1990, Bockhold gave Mosbaugh a part-year performance appraisal for the first and second quarters of 1990. CX 48 He was given a "Level 3" overall rating, an "average kind of rating," lower than any other Mosbaugh had received during his employment at Georgia Power. TR 301

After the NRC's OSI team of inspectors left Plant Vogtle, Mosbaugh was asked by the NRC's Robinson to "wear a wire" for the NRC at work. Mosbaugh considered doing so, but eventually declined. He also did not tell Robinson at this time that he had secretly recorded conversations over the previous months at the plant. TR 304

[Page 17]

On September 11, 1990, Mosbaugh joined a former co-employee of the Georgia Power Company, Marvin B. Hobby, as petitioners to the Chairman of the NRC. CX 49 The petition requested initiation of licensing proceedings by the NRC to impose civil penalties upon the Georgia Power Company for illegal transfer of control of its operating licenses to SONOPCO, and for unsafe and improper operation of its licensed facilities. CX 49 Mosbaugh had been working in the preparation of that petition with his attorney, and with Hobby, since May 1990. TR 305, Mosbaugh Brief, p. 55

5. *GPC Management's Treatment of Mosbaugh.* Mosbaugh's earliest perception of overt hostility and suspicion for his whistleblowing arose from several encounters in late

January and early February 1990, particularly the "teamwork" meeting with Bockhold, several passing comments made by Bockhold during those weeks, and his discussions with Bockhold about his future in the company during the February performance evaluation. Mosbaugh was worried about his position in the company. He had secretly mailed his whistleblowing allegations to the NRC in early January; the NRC investigators were proceeding with an investigation of the October 1988 dilution valve event he and his "Operations" staff had insistently brought to light a few months earlier; and he was concerned that he was suspected of being the NRC allegor. Although Mosbaugh had eventually joined in the PRB vote that the October 1988 event was not "reportable" to the NRC, it clearly had been at Mosbaugh's insistence that the PRB had to face the issue directly. TR 129

George Bockhold testified at the hearing that he did not know or suspect in January or February 1990 that Mosbaugh was the anonymous NRC allegor who caused the NRC-OZ investigation at that time (TR 642), and generally that Mosbaugh's concerns about retaliation had not been well founded. During all of the time in issue in these proceedings, Bockhold was the senior on-site manager at Plant Vogtle. TR 632

As far as the October dilution valve event itself was concerned, the issue being investigated in January - February 1990 by the NRC-OZ, Bockhold testified that he believed Mosbaugh had voted with the PRB on that issue and that that was his final action in that regard. TR 646 He recalls asking people at the plant about the source of the allegation, not to uncover the individual personally, but in order to talk to supervisors to improve communications at the plant. TR 645 He suspected that the allegation had come from engineering, that is, the "Support" department staff managed by Mosbaugh at that time. TR 691

Bockhold testified that the "teamwork" meeting with Mosbaugh and Kitchens in January 1990 was nothing more than it purported to be. TR 640 His immediate corporate supervisor, McCoy, had expressed a need for improved teamwork between Mosbaugh and Kitchens and their respective staffs in December or January. Bockhold testified:

[Page 18]

I spoke to them in a team-building session, I believe it was in January of 1990, and at that time I started out with "Gee, we've got to work on teamwork, and I have some faults," and wrote some faults on the blackboard, and then asked them to identify their faults, and we had a team-building session to go over our faults and figure out how we were going to better communicate and work

together to improve efficiency and solve plant problems and make progress at Plant Vogtle. TR 640

He did not "single out" either of them in this meeting, and each of them received a notation in their upcoming annual evaluations that "peaceful coexistence" between them was not good enough. TR 640

Several weeks later, in February, Bockhold let it be known at Plant Vogtle that the decision had been reached to move to a "1050 organization" for Plant Vogtle. TR 643 Plant employees were formally told on February 3, 1990 that the target organization for Plant Vogtle, to be implemented in the coming months of 1990, would have a total employee staff of 1,050 employees. TR 643, RX 62 The reorganization was a "downsizing" designed to increase operating efficiency for the plant. The then current level of permanent employees was approximately 1,280 people. TR 643 Bockhold made an effort to deal with staff members' concerns that they would lose their jobs, by announcing that while job levels would be changed, to higher or lower levels, existing salary levels would not be reduced and staff reductions would be made by normal attrition.

Bockhold believed that Mosbaugh had known for a long time that this post-construction/start-up reorganization would take place, and that his position managing the "Operations" department was held in an "acting" status only. Bockhold testified:

As early as 1988 Ken McCoy and I had a conversation with Allen Mosbaugh about, you know, what would happen associated with reorganization.

In fact, we offered him a job in Birmingham, and he declined because he said he did not want to move, and he said when the reorganization happened at the plant site he would be willing to basically take his chances with the other people to find out what type of job he would have. TR 644

Bockhold pointed out that Mosbaugh had reported to Tom Greene at the time Greene was sent to the SRO school in early 1989. At that time, when Mosbaugh took Greene's position on an "acting" basis, Bockhold testified:

My expectations were that Mr. Greene would be successful in his SRO licensing program, he would come back and replace Allen who was acting for him, and in all probability at that time if Allen was willing to make a commitment to stay with the company we would send him to SRO school. TR 655

From prior conversations with Mosbaugh some 2 years earlier, Bockhold had concern that Mosbaugh was considering retiring early, possibly in 3 years or so. Bockhold stated:

... I had a basic concern because we spent basically a quarter of a million dollars, \$250,000 or so to send a person through SRO school, and if you invest that kind of money you want to get some return on it, and although we don't ask people to sign contracts we are interested in their motivation. TR 656

That theme, a consideration of Mosbaugh's options in the company focusing on SRO school, was continued in discussions in April 1990 when Mosbaugh learned Greene was coming back and would take over the work Mosbaugh had been doing. At that time, Bockhold asked Mosbaugh for his preferences in assignments, bearing in mind the new "1050" organizational structure being implemented. Several days later Mosbaugh gave Bockhold his list which included the SRO school. When he was given the list, Bockhold testified:

I also asked him after this whether he wanted to apply for another corporate position that I had heard about, and he once again said he wanted to stay at the plant, wanted to stay in the Augusta area. TR 658

Bockhold testified, essentially, that he believed Mosbaugh's options at this time, with the return of Greene from SRO school, were either to take a demotion in position at Plant Vogtle, to go to SRO school, or to relocate to another career opportunity outside Plant Vogtle. TR 659

On May 7, 1990, Bockhold announced at a staff meeting that Tom Greene "was coming back to his position," and congratulated Mosbaugh for a good job in Greene's absence. He also announced that Mosbaugh then would be reporting directly to Bockhold for his assignments. TR 660

With respect to the FAVA filtration system, which had been a major concern of Mosbaugh, as discussed above, and which became the subject of another allegation of impropriety filed by Mosbaugh with the NRC, Bockhold testified that he regarded the matter only as a professional difference of opinion, that the matter was handled by GPC in a professional manner, and that Mosbaugh's involvement in the matter did not upset him. TR 650

Bockhold presented an entirely different perspective and description of the FAVA matter from that presented by Mosbaugh. In Bockhold's view, use of the FAVA filter at Plant Vogtle would serve a desirable objective, removal of radioactive contamination in water discharged into the Savannah River, with the installation done in a way that

would resolve Mosbaugh's concerns. After Mosbaugh voted against use of the filter at the

[Page 20]

February 8 PRB meeting, Bockhold discussed the issue with McCoy and decided to deal with his concerns. He testified:

... we decided not to allow the system to be placed into operation until we could go ahead and review his concerns. We ended up assigning Paul Rushton at that time to investigate and work with Allen. In fact, for a period of time I told him [Mosbaugh, TR 649] to spend I think 50 percent of his time working on that concern to get it resolved. We involved the NRC residents, we involved the NRC regional folks.

Finally we could not resolve the concern fully with Allen, but the NRC had no problem with putting it in service. In fact, they basically agreed with us that it would reduce environmental contamination, and so we did place it in service for a period of time. TR 647, 648, DX 71

Rushton was a corporate manager responsible for the engineering audit section. TR 648 Bockhold testified that he brought Rushton into this matter to provide independent engineering help on the issue. He did so, he testified, because Bill Lyons had trouble with the assignment. Bockhold testified:

Bill Lyons worked directly for Allen Mosbaugh. Bill was concerned about the fact that Allen had submitted this quality concern, and he was reporting to the person that submitted this quality concern, and he couldn't effectively resolve it because he had a majority of the plant managers voting to activate the system to prevent environmental releases, and he had his immediate supervisor having an opposite opinion, so when Bill expressed that concern I said "I'll take care of that concern," and the way I took care of the concern is really I got an independent person who was not involved in the meeting, not involved in the FAVA filter, who could really get the engineering support from corporate involved to resolve the issue. TR 650

Ultimately, Bockhold stated, it was "fine" that Mosbaugh disagreed, "We could disagree, but we felt we had covered all our bases and provided appropriate information, and even had NRC support to put his unit into service." The FAVA filter was put into a concrete vault, Bockhold stated, so that any potential leakage from the filter would be contained. TR 651

With respect to Mosbaugh's treatment in the company after April 1990, Bockhold testified that there was nothing improper about replacing Mosbaugh with Greene on the PRB. Since Green had resumed his position as manager of the support department on return from SRO school, it was consistent with the 1989 reconfiguration of the PRB to place him as vice chairman of the PRB. Moreover, since Mosbaugh would no longer have line manager responsibilities at Plant Vogtle while his future assignment was being

[Page 21]

considered, Bockhold decided to give him special assignments and not to place him on the PRB as an alternate member. TR 661 - 664 Bockhold testified that Mosbaugh's removal from the PRB was due to management organizational factors, and was unrelated to Mosbaugh's conduct on the FAVA filter issue. TR 661 Bockhold testified that the special assignments he then gave to Mosbaugh were "important jobs associated with key plant issues," and he described several of those jobs in detail. TR 662 - 664

After Mosbaugh filed his first DOL complaint in early June 1990, Bockhold told Mosbaugh to identify the specific problems he was concerned about, and he arranged with McCoy to have Leo Glenn, the corporate level "quality concerns" manager, to work with Mosbaugh in that process. On July 6, Bockhold sent a memorandum to Mosbaugh discussing the matter formally, after Mosbaugh had said he had additional concerns he would only discuss with the NRC. DX 44 There, Bockhold directed Mosbaugh to "immediately notify the NRC of any legitimate concerns that you may not have identified to us."

On August 13, 1990, Bockhold sent a memorandum to Mosbaugh, announcing that he had been reassigned, effective September 8, to attend the SRO school. With this assignment, the notice stated, Mosbaugh would receive a \$200.00 monthly bonus, but that he would not be eligible to keep his company car in his new SRO training classification. DX 32

Bockhold first learned that Mosbaugh had been tape recording conversations at Plant Vogtle on September 12, 1990, the day he was being deposed by an attorney for Mosbaugh in preparation for trial for the first of Mosbaugh's DOL complaints. He discussed that matter with McCoy the next day. He testified:

I got a phone call from him the next day, I think it was in the evening, and then on Saturday morning I got a phone call from him, I was out at the plant, and basically he had decided to put Allen Mosbaugh on administrative leave, and I read to Allen the statement that Ken had directed me to read to him. TR 676

Bockhold did not otherwise discuss the taping matter with any employees until early in the following week when he told about it at a staff meeting. On September 19th, Bockhold made a general announcement to all employees, stating that the company had learned Mosbaugh had taped conversations with a large number of employees over an extended period of time, and that he had been placed on administrative leave for 30 days. DX 22, TR 679

Bockhold did not participate in the decisions to put Mosbaugh on administrative leave and then to discharge him, other than to tell McCoy of his own negative reaction and that of members of his staff. TR 677

[Page 22]

C. K. McCoy testified at the hearing. He is a vice president of both Georgia Power Company and SONOPCO, and he is responsible for the operation of Plant Vogtle. McCoy joined the Georgia Power Company in June 1988. One of his first acts was to visit Plant Vogtle to introduce himself personally to the top level managers there. He recalls that in his first meeting with Mosbaugh they discussed their similar "early retirement" objectives. Mosbaugh discussed a small farm he had near Cincinnati that he would like to "go back to." This discussion seems to have been a generalized get-acquainted social discussion, not a comparison of firm career goals. TR 526

McCoy was a frequent visitor to Plant Vogtle and kept in close contact with Bockhold there. It was his observation that Mosbaugh was "very competent" in technical skills, but needed improvement in communication skills as a manager. TR 527 McCoy's testimony supports Bockhold's averment that Bockhold's "teamwork" meeting in January 1990 with Mosbaugh and Kitchens was the result of McCoy's directive to focus on improving management skills of the senior managers at Plant Vogtle. TR 531 Bockhold reported to McCoy, after that "teamwork" meeting, that it had been an open and productive session. TR 532

Once the Unit 2 reactor went into commercial service in May 1989, it became necessary to scale down employee strength from the higher levels needed for the testing functions performed in the pre-operation, or "start-up" status of the plant. TR 530 Accordingly, the "downsized" reorganization for Plant Vogtle was agreed upon, and then made public in February 1990. McCoy was aware that this was a traumatic period for personnel at the plant, and that fact was a basis for the determination not to release employees immediately, but to scale down gradually by attrition. TR 535

McCoy testified that Mosbaugh knew from approximately July 1988 that his formal position at Plant Vogtle would be eliminated after "start-up" was completed. TR 603
McCoy testified:

... we were at that time staffing the corporate support organization for the Vogtle project for the first time, and we offered Allen a job in the corporate support organization with the recognition at that time his job was going to be going away after startup...

... but he declined that job at that time and expressed that his desire was to stay in Augusta, and so, you know, I wanted to make clear to him in doing that he was taking some risk because his job was going to be done away with and you know, we would just have to see what was available at that time, so I remember that discussion also. TR 537

McCoy participated in handling the FAVA matter. He believed that use of that filter temporarily, while a permanent device was designed and installed, would serve a good purpose. The FAVA device was an experimental device to filter out fine

[Page 23]

radioactive particles in liquid being discharged from the plant. It had been tested with success, and then taken out of service some time earlier. After Mosbaugh raised his concerns about the system in the PRB vote in February 1990, McCoy arranged for more analysis, and to have the NRC "take a look" at the system. Eventually, based on his discussions with the NRC's regional staff after they had "looked at it," McCoy concluded that NRC had no objection to use of the FAVA filter. TR 533, 540

McCoy was at a hotel in Augusta on September 11, 1990, awaiting to be deposed by Mosbaugh's attorney the next day, when he was advised by GPC's attorney about Mosbaugh's tape recording activities at Plant Vogtle. The next day, together with Bockhold, he was told of the extent of that recording activity, particularly that "at least 30 people had been identified as having been secretly tape recorded." TR 543

McCoy then telephoned his "boss" as SONOPCO in Birmingham, either Hairston or McDonald, to let them know. He also learned later that day that Mosbaugh had filed a petition with the NRC regarding the legality of the corporate control and operation of Plant Vogtle by GPC. He then also advised his management at SONOPCO of that fact. TR 543

In June 1990, after he learned of Mosbaugh's first DOL complaint, it was McCoy who gave instructions to Bockhold to have Mosbaugh tell his concerns to the NRC and to have Leo Glenn get involved in that process. Later, after Mosbaugh told Glenn he

preferred to talk only to the NRC, McCoy instructed Bockhold to instruct Mosbaugh to make known any of his concerns to the NRC. TR 545

When Mosbaugh was recommended for SRO school in July 1990, McCoy met with him to see if he was still considering an "early retirement," or would make a commitment to stay with the company. That meeting took place on July 11. TR 551 Several days after that meeting, in mid-July, McCoy approved Mosbaugh's selection for the SRO school, TR 589, and Mosbaugh was advised of that decision on July 17. TR 419 McCoy testified that Mosbaugh's activities filing quality concerns, his actions on the PRB, and his filing the DOL complaint had no consideration or impact in deciding to sent him to SRO school. TR 558

When McCoy spoke to Mosbaugh in February 1990, he testified, about a possible job opportunity in a nuclear plant start-up job with the TVA at its Watts Bar plant, it was merely the passing along of information, with McCoy recalling his prior discussion with Mosbaugh suggesting an interest in getting closer to his small farm near Cincinnati. TR 563-565 On cross examination on this point, McCoy conceded that, while he believed the Watts Bar plant was closer to Cincinnati than Augusta, he did not know how far it was from Cincinnati. TR 592

[Page 24]

With respect to the requirement that Mosbaugh turned in his company car on being sent to SRO school, McCoy testified that this requirement was standard company policy for employees in Mosbaugh's category in this situation, and that the policy had been consistently followed in the past. TR 567 Tom Greene had kept his company car when he went to SRO school because his compensation package as an assistant general plant manager included a car for personal use. Managers below that level were assigned company cars if needed for job-related availability on night duty assignments or emergencies. Jim Beasley, the outage manager, had had to turn in his car on going to SRO for that reason. TR 566, 567

When McCoy learned on Wednesday, September 12, that Mosbaugh had tape recorded other workers at Plant Vogtle, he testified, he reacted as follows:

I was upset. You know, there are several immediate kinds of reactions. One was, you know, what would cause somebody to do that.

A second reaction was that in the environment that we had been trying to develop and working on in terms of teamwork and open communications, that could destroy all the things that we had been working for for a couple of years.

TR 569

At his SONOPCO office in Birmingham on Thursday, September 13, McCoy recommended to his corporate superiors that Mosbaugh be placed on administrative leave while they investigated the circumstances. He testified:

Well, the primary factor was that I didn't feel that we could have open communication at the site with Allen there, that the employees at the site would not trust him, would not be willing to talk openly about any subjects.

I felt it would hamper any interactions we had with the NRC if they were aware that this kind of activity had been taking place. TR 570

Although the primary factor he considered was the impact on open communication at Plant Vogtle, McCoy testified, he also later became concerned that the taping had violated the "safeguards" requirements of the NRC, that is, the requirements for strict security for documents concerning safety of the nuclear plant. TR 571

McCoy also said he felt shocked to find out that Mosbaugh had been engaging in such tape recording activity, and felt concerned about Mosbaugh's motives. TR 574 He testified that he regarded placing Mosbaugh on administrative leave not as a punishment, but as a situation in which to find out "what was going on." TR 575 The actual decision to place Mosbaugh on leave was not made by McCoy, but by Dahlberg, GPC's president. TR 594

[Page 25]

On Friday, September 14, McCoy consulted with GPC's attorneys in drafting the statement placing Mosbaugh on leave, and then he directed Bockhold to implement the action.

During the 30-day period following September 15, McCoy visited Plant Vogtle several times and discussed the matter with several managers, sitting in on a number of staff meetings. He testified that there "was a chill on the whole atmosphere in terms of working relationships and communications." TR 578

McCoy testified that he gave consideration to other options, such as allowing Mosbaugh to go forward with SRO school or being transferred to another plant, but concluded:

...that there just wasn't any place that we could use that kind of talent and have him be effective, that employees would not trust him, he could not be a supervisor, people would be reluctant to discuss their problems and so forth with him, and he would have a chilling effect on conversations he participated in. TR 579

At the end of the period of administrative leave, McCoy felt that Mosbaugh should be dismissed because he believed Mosbaugh could not be an effective manager or supervisor at GPC or SONOPCO in the future. He recommended dismissal to his corporate management. TR 581 At that time, McCoy did not know that Mosbaugh had filed anonymous allegations with the NRC about operations at Plant Vogtle. McCoy first became aware of that fact at a later date. Similarly, McCoy did not then know Mosbaugh had a "confidentiality agreement" with the NRC, or that Mosbaugh was having off-site confidential meetings with the NRC in the Summer of 1990. TR 586

With respect to Mosbaugh's activities and allegations to the NRC pointing out incorrect data in GPC's statements to the NRC about the diesel start-up testing following the March 1990 site area emergency, McCoy agreed on cross examination that he had been aware of these matters at the time Mosbaugh's employment was terminated. TR 612-615

A. W. Dahlberg, president and chief executive officer of the Georgia Power Company, testified at the hearing. He stated that he made the decision to place Mosbaugh on administrative leave for 30 days, and then later to terminate his employment. Dahlberg was informed by SONOPCO vice president McDonald on Wednesday, September 12, "that Mosbaugh had secretly taped conversations with numerous employees of the company, his fellow employees at the plant." TR 466 His reaction was anger, he said, because he thought that type of behavior "was something that should not be tolerated." At this time, Dahlberg did know that Mosbaugh had filed a whistleblower complaint with the Department of Labor. He stated:

[Page 26]

I did consider it. I guess I should say at the time I first found out about the tapes my reaction was that we should immediately dismiss Mr. Mosbaugh. I realized there was some sensitivity about that, I was concerned about the complaint that he had filed. I discussed it with Mr. McDonald on the telephone, and Mr. McDonald persuaded me that we should at least just go through a period of administrative leave to make sure that we understood the facts in the case, and I agreed to a period of thirty days to place him on administrative leave. TR 475

At the time the decision was made to put Mosbaugh on administrative leave, Dahlberg knew that, in addition to filing the DOL whistleblower complaint, Mosbaugh had internally raised issues about the FAVA filter and about the accuracy of GPC's responses to the NRC following the March 1990 site area emergency, a subject of

investigation by a special investigative branch of the NRC, TR 515, but he did not know that Mosbaugh had made anonymous allegations to the NRC, that he had a "confidentiality agreement" with the NRC, or that he had filed the petition with the NRC challenging corporate control and operation of Plant Vogtle. TR 471, 489

Dahlberg knew then that Mosbaugh had been selected to go to SRO school, and that he was a valuable company employee. He testified:

I was familiar with Mr. Mosbaugh, I wasn't familiar with all of his professional credentials.

I recognized, however, that if he had been placed in an acting manager's position he obviously had value, and if we had made a decision to include him in the SRO training he had value, so I certainly was aware of that, and that is a part of the consideration, but I really thought the circumstances were so strong that even with that value that the decision was correct. TR 481

During the 30-day period Mosbaugh was on administrative leave, Dahlberg discussed the matter regularly with McDonald and Hairston, and with the company's lawyers, TR 499, but concluded that dismissal was the correct decision. He testified:

I didn't find anything in the investigation that made any conclusion other than the fact Mr. Mosbaugh had conducted the taping on his own, not at anybody else's request, it didn't change my opinion that it had destroyed the relationship that he had with other employees and our ability to conduct business. Nothing persuaded me that he could effectively operate as an employee of the company because of that, and my decision was the same that he should be dismissed. TR 478

[Page 27]

Mr. McDonald again reviewed the circumstances with me, and he may have recommended, but if he had not I would have made the same decision, I would have at that time made that decision, and I'm not sure whether he said "I think we should" or I said that, but ultimately the decision was mine and I made it. TR 479

When asked on cross examination why the company had not included a specific prohibition against secret tape recording in the company's formal work rules and policies, Dahlberg stated:

I consider that conduct to be intolerable. I don't think it's something that should be accepted. That was the decision that I made, and I still believe that's the correct decision.

I don't think most employees, rational employees, would secretly engage in taping conversations with their fellow employees. I don't think you have a policy for every piece of conduct for an employee; I don't think that's necessary. TR 486

With respect to Mosbaugh's purpose in tape recording conversations so as to gather information for the NRC, Dahlberg stated:

If he had operated under the supervision of the NRC at their request as an employee of NRC and I had known that, then I don't think he would have been terminated.

The facts in this case are that I didn't know he was working with the NRC, I don't know that today. I knew that he tape recorded more than three hundred conversations with employees, and I later learned with also employees of the NRC, operating on his own, not at their request, not under their supervision, not being paid by them, and for that he was dismissed. TR 488

6. Mosbaugh's Tape Recording: Reasons and Scope. Mosbaugh decided to conduct his secret tape recordings of conversations at Plant Vogtle in February 1990. At that time he felt significant fear of retaliation. He had concluded that management of Plant Vogtle was fostering risk-taking in making decisions, to the point of violating NRC requirements so that GPC's own scheduling requirements would be met. TR 109 He had been pressing his internal questioning on important safety and regulatory matters, his recent anonymous allegations of potentially criminal violations were being investigated on-site by the NRC-OZ, and he felt a burden of suspicion directed toward himself. TR 352 He then came to believe that his personal notes and recollections of conversations and events were not supported by hard documentation, and could be contradicted by others at the plant. TR 190 He apparently came to believe that he had verbal evidence of intentional violations, and knew "no other way" to document or substantiate his evidence than by tape recording. TR 190

[Page 28]

At that time he reviewed a legal opinion, CX 26, in the files of GPC at Plant Vogtle, and concluded that this legal opinion had application to the tape recording activities he would undertake, that the legal opinion:

... says in essence there should be no problem with managers doing one-party tape recording. TR 191

Mosbaugh concluded:

My understanding [was] that there was no policy prohibiting one-party taping by personnel, by managers, and my understanding of this memo is that the conclusion was that there was no legal problem with doing one-party taping by managers. TR 194

Mosbaugh reviewed other GPC policy documents relating to this general subject, such as searches, contraband, prohibitions, plant rules, etc., and found no policy bar prohibiting his planned tape recording. TR 194, and following.

The legal opinion referred to by Mr. Mosbaugh, CX 26, is a July 15, 1988 letter from outside counsel to the Security Manager for Plant Vogtle concerning proposed tape recording of incoming telephone calls in an effort to identify sources of threats of violence. The opinion provides a brief review of federal wiretapping law, Federal Communications Commission regulations of telephone service, and the Georgia state privacy statutes. The opinion concludes that, except for a "remote possibility" of a dispute with the FCC regulated telephone company:

... there should be no legal problems with attaching tape recorders to the telephones of Georgia Power managers as long as they are given control over whether particular conversations are recorded. CX 16, p. 3

When Mosbaugh was told that his annual performance review would be conducted on February 23, 1990, he felt apprehensive that the company might try to "pull something" related to his job situation during the performance review, and he proceeded to tape record that meeting. That was the first of his tape recordings of conversations at Plant Vogtle. TR 202 Mosbaugh placed a small, \$39 department store pocket microcassette tape recorder in his pants pocket, and switched it on to record the conversation. TR 204

For about a month, Mosbaugh recorded selected and limited conversations in this manner, perhaps 3 tape recordings in all. On March 20, 1990, however, the "Site Area Emergency" occurred, the next highest level of emergency that could take place at a nuclear plant. In the course of staff meetings in the succeeding days, Mosbaugh detected the "non-conservative, risk-taking" attitude he previously had been concerned about, which disturbed him a great deal, and he concluded that his note-taking

[Page 29]

was inadequate to document what he observed. Accordingly, he then began to tape record conversations daily, more continuously, accumulating the total of 277 audiocassettes discussed above, with as much as 2 hours of tape recording on each cassette. As discussed above, Mosbaugh did not advise the NRC of his tape recording

activity until September 1990, at the time of his pretrial deposition by the Georgia Power Company.

7. *Plant Vogtle Cohort Response to the Taping.* Michael W. Horton was the manager, engineering support, in the plant "support" department during the time Mosbaugh was the acting head of that department at Plant Vogtle, and he continued in that position in July 1990 when Mosbaugh had been replaced by Tom Greene. On July 18, Horton participated in a conference telephone call with a number of other participants from Plant Vogtle, the corporate staff, and representatives of Cooper Industries, the vendor of the plant's diesel generators. This was a type of "party line" hook-up, with any number of participants able to participate or listen in on extension telephones or speaker phones. The discussion related to a serious problem, a manufacturer's defect causing starting failures. The degree of seriousness to be determined would affect the type of report that would have to be made to the NRC. Horton recalled a wide ranging discussion, and exchange of opinions, among the participants. He did not know that Mosbaugh was a participant in the conference call. Mosbaugh stated at the hearing that he did not think the other participants in the conference call knew he was tape recording the conversation. TR 424 Horton later learned that Mosbaugh had tape recorded that conference call, and that, in addition, he had tape recorded other conversations at the plant over the prior months. At the hearing Horton expressed "extreme disappointment" with Mosbaugh for having recorded such conversations. He said:

I guess basically just extreme disappointment, mistrust in -- you know, thoughts race through your mind as to what all occurred over the last six months, and thinking of situations "Well, what was his motivation at this time," and "What was going on here when he was guiding me in this direction," and what have you, and just kind of betrayal in general. TR 812

Horton said he thought the tape recording conduct would affect Mosbaugh's ability to be a manager at Plant Vogtle in the future, saying it would dampen discussions and free expression, and raise the fear of being second guessed and having opinions taken out of context at a later time. Since operation of the plant required close interpretations of NRC rules and regulations that are not always clear, he testified:

... to have differences of opinion aired openly is healthy, and it's a necessity to survive to come to the correct decision, to get everybody's input. If you have an environment where that wasn't possible, you would be kind of strangled. TR 813

Several other Plant Vogtle employees were presented at the hearing and testified to similar feelings and reactions when they learned that Mosbaugh had been secretly tape recording conversations at Plant Vogtle. One of them, Lee Mansfield, an engineer who reported to Horton, also recalled that Mosbaugh seemed in 1990 to be "bringing up old issues that had long since been decided." TR 844 Concerning Mosbaugh's tape recording activity, Mansfield stated:

When I found out that Mr. Mosbaugh had been taping, it was one of the biggest surprises of my life.

Mr. Mosbaugh and I had been, you know, had a good working relationship, we had actually been very good friends.

I felt betrayed, I felt like my privacy had been invaded. I was just disgusted that this would have gone on without my knowing. TR 848

It was evident from the testimony of these witnesses that, after management notified the Plant Vogtle staff about nature and scope of Mosbaugh's tape recording activities in September 1990, that subject was discussed, with a general sharing of personal reactions, in a number of staff meetings at the plant. TR 858, and following.

David M. Herold, who holds a Ph.D. in organizational behavior and who is a professor at the School of Medicine at the Georgia Institute of Technology, testified on behalf of the Georgia Power Company. His work includes consulting with major corporations, including nuclear power companies, focusing on management problem solving, organizational structure, and management development and training. He was qualified to testify in this proceeding as an expert in organizational behavior. He reviewed portions of the transcripts of several of Mosbaugh's tape recordings and a number of other documents, and was given a general understanding of the circumstances of Mosbaugh's activities at Plant Vogtle. TR 743 He gave the opinion that the kind of taping activities done by Mosbaugh could dampen the free flow of information in the work environment and adversely affect leadership, authority, communications, and teamwork within the workplace.

8. Discussion and Conclusions. The general rules governing the allocation of burdens and the order of presentation of proof in whistleblower protection cases arising under the Energy Reorganization Act, as implemented by 29 CFR Part 24, are well established. In *Dartey v. Sack Company of Chicago*, 82-ERA-2 (April 25, 1983), the Secretary of Labor held that a whistleblower complainant initially must present a *prima facie* case, consisting of a showing (1) that he engaged in protected conduct, (2) that the employer was aware of that conduct and took some adverse action against him, and (3) that the evidence is sufficient to raise the inference that the protected activity was the likely

reason for the adverse action. If the employee establishes a *prima facie* case, the employer has the burden of going forward with evidence of legitimate, nondiscriminatory reasons for the adverse action. If the employer

[Page 31]

presents sufficient evidence to rebut the *prima facie* case, the employee still may demonstrate that the proffered reasons for the adverse action were not the true reasons, but a pretext for discrimination. Throughout this process of analysis, the employee bears the ultimate burden of persuasion, by a preponderance of the evidence. These general rules are derived from *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981), and *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977).

In this case, the Georgia Power Company contends that Mosbaugh has failed to prove a *prima facie* case, but its analysis on this issue seems to equate that first stage proof requirement with the Complainant's ultimate burden of persuasion in the case. GPC contends that, while those of Mosbaugh's activities directly associated with NRC contact were protected activity under the statute, his tape recording activity was not so protected, and that, since he was discharged for the taping activities alone, his claim of retaliatory discharge "fails as a matter of law." That approach to determining the existence of a *prima facie* case is too rigid an application of the Dartey/Burdine standards. The requirement of proof of a *prima facie* case is not intended to be "an onerous burden," *Burdine*, at 253, but rather the first of several stages of a "sensible, orderly way to evaluate the evidence in light of common experience" as it bears on the ultimate determination to be made. Compare *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 103 S. Ct. 1478 (1982).

Even if Mosbaugh's secret tape recording activity at Plant Vogtle was, in itself, conduct not protected by the Energy Reorganization Act, as GPC here contends, such a fact would not be dispositive of this complaint. A complainant is not required to prove that protected activities were the sole, or principal, reason for the employer's adverse actions. It is sufficient to prove that the adverse actions were motivated at least in part by protected activities. See *DeFord v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983) and *Mackowiac v. Univer. Nuclear Systems, Inc.*, 735 F. 2d 1159 (9th Cir. 1984). Moreover, while a complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse actions, that retaliatory motive is provable by circumstantial evidence. *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563 (8th Cir. 1980).

The circumstantial evidence in this case is sufficient to raise an inference that the tape recording activity, or at least its disclosure to GPC in September 1990, was a culmination of events in Mosbaugh's recent dealings with his GPC management, a final straw in that relationship, not a discrete event leading to a discrete company response. The circumstances affecting the top levels of management of Plant Vogtle, GPC, and SONOPCO, from plant manager Bockhold to corporate president Dahlberg, were truly extraordinary during the week of September 11, 1990: top management officials were being deposed in the litigation over Mosbaugh's June 6 whistleblower complaint; they had just weeks earlier come through an

[Page 32]

unusual "team inspection" by the NRC; at least some of these of top management officials knew that Mosbaugh was directing his additional "concerns" personally and privately to the NRC in his "whistleblower" persona; and at least some of them knew he had tenaciously pursued a number of troublesome "concerns" internally in recent months, particularly on the FAVA matter and the question of "false" reports to the NRC following the March 1990 site area emergency. In the week of September 11 these management officials suddenly also learned that Mosbaugh had secretly tape recorded up to 600 hours of conversations at Plant Vogtle over the prior 6 or 7 months -- and now had given over those tapes to the NRC in accordance with a judge's order -- and that Mosbaugh had now filed a petition with the NRC challenging the very legality of GPC/SONOPCO corporate control and operation of Plant Vogtle.

I conclude that, absent GPC's production of evidence of a purported legitimate basis for its adverse actions toward Mosbaugh, the coming together of events and issues during the week of September 11 -- a time when top management officials were personally testifying in depositions concerning their dealings with Mosbaugh who may have tape recorded those dealings -- would present a sufficient chain of facts from which it could readily be inferred that all of Mosbaugh's 1990 "concerns" activities, not just the tape recording, were the reason for discharging him. Given that conclusion, and the evidentiary showing by GPC that the discharge was caused only by revelation of his secret tape recording activity, I further conclude that all of the evidence must be evaluated to determine whether unlawful retaliatory action against Mosbaugh has been established by a preponderance of the evidence.

Complainant contends that, given the nature of the "willful wrongdoing" he was seeking to document, his tape recording activity at Plant Vogtle was the only reasonable method he could utilize to secure such documentation. Accordingly, he

contends, since his tape recording activity was reasonable and in furtherance of the statutory purposes of the Energy Reorganization Act, such activity may not by itself be a legitimate basis for his dismissal. Complainant's argument is not persuasive.

Whistleblower activity is protected under the Energy Reorganization Act, but that protection is not absolute. In the *Dartey* case, *supra*, for example, which also involved a Section 5851 whistleblower complaint, the Secretary of Labor held that an employee who "committed an act which no employer need tolerate," misappropriation of confidential company records, had engaged in activity "which warranted suspension or discharge in the discretion of the employer." Dartey's complaint of retaliatory discharge was denied on that ground.

In the present case, it is not necessary to decide whether an employee's privately undertaken, secret tape recording of workplace conversations is, in itself, activity beyond Section 5851 protection, activity which "no employer need tolerate," the *Dartey* test. I agree with the argument of Respondent here that, assuming Mosbaugh's tape recording activity was protected at the outset, its continuation

[Page 33]

and scope became so egregious and potentially disruptive to the workplace that it lost any protected status it may have once possessed. Over a period of a number of months, Mosbaugh secretly tape recorded hundreds of hours of conversations at Plant Vogtle, conversations with and between his subordinates, his peers, and his superiors in the company, and did so entirely on his own. As noted by the Secretary of Labor in *Dartey*, there are formal legal avenues available for obtaining evidence of illegal conduct in investigation and enforcement proceedings. By the end of March 1990, Mosbaugh had already filed three anonymous reports to the NRC and given testimony to an NRC investigator, with detailed allegations of willful, arguably criminal, "blatant disregard" of safety compliance regulations. Having placed these matters into the hands of competent governmental authority, the NRC criminal investigators, it was no longer reasonable or appropriate for Mosbaugh to go forward, on his own authority, with the tape recording aspect of his private investigation at Plant Vogtle. His co-workers have given credible testimony that sufficiently supports the company position: that Mosbaugh would no longer be an effective employee at Plant Vogtle because fellow employees would fear working with him there. I conclude that GPC had a valid reason to take strong adverse action against Mosbaugh on learning of his extensive tape recording activity at Plant Vogtle, including placing him on leave for a period of time, and discharging him after considering its options.

I further conclude that the evidence does not show GPC's reasons to have been a pretext for unlawful retaliation. GPC president Dahlberg testified that he personally made the decisions to put Mosbaugh on leave and then to discharge him, and that he did so solely because of the tape recording activity. I credit his testimony that he wanted to fire Mosbaugh on Wednesday September 12 as soon as he learned of the taping, that he was prevailed upon by his vice president McDonald to hold off for a period of time, and that he was not persuaded to do anything else at the end of that waiting period. On September 12 Dahlberg was aware of Mosbaugh's June DOL whistleblower complaint and he was aware that Mosbaugh had pressed "concerns" such as the FAVA issue at Plant Vogtle, but he also knew that Mosbaugh had been selected to attend SRO school despite that ostensible whistleblowing activity. Before he made the final decision to fire Mosbaugh, Dahlberg learned that the hundreds of hours of tape recordings had been turned over to the NRC, and that Mosbaugh had filed a petition challenging GPC/SONOPCO operation of Plant Vogtle, but those facts do not move me to a different conclusion. The 30-day waiting period for investigation was for Dahlberg not anything more than a time to discover whether there was a factual basis or a legal basis to persuade him not to fire Mosbaugh. In light of the *Dartey* holding, Dahlberg was not required by law to follow a different course. The new information coming to light while Mosbaugh was on administrative leave, that Mosbaugh's improperly obtained investigative evidence had been turned over to the government, and that Mosbaugh had filed a petition hostile to Dahlberg's interests, did not strip GPC of its right to act, wisely or unwisely, as an employer.

I have carefully and skeptically examined the record of Mosbaugh's dealings with McCoy and Bockhold, in particular, for facts to justify disbelief of GPC's asserted

[Page 34]

reasons for firing Mosbaugh. Bockhold worked directly with Mosbaugh at Plant Vogtle, and McCoy was Bockhold's supervisor at the corporate level. As Mosbaugh's immediate supervisors, they would obviously be accountable for the failures or wrongdoing implicit in Mosbaugh's allegations. However, I conclude that if they harbored retaliatory animus prior to the September 1990 disclosure of the taping by Mosbaugh, they concealed it well. Their dealings with Mosbaugh seem to have been even-handed and fair up to the time he was assigned to SRO school. The record shows that Mosbaugh should not have been surprised that his job slot would be eliminated in the approaching 1990 reorganization, nor that Tom Greene would "come back" from SRO school to his own job slot at about the time he did so. There is no evidence that Greene's stay at SRO

school was shortened, thus to provide a pretextual basis for ousting Mosbaugh. The reasons stated for Mosbaugh's removal from the Plant Review Board were entirely credible in those circumstances, as were the reasons for Bockhold's giving Mosbaugh special assignments prior to the SRO school, and for taking away his company car in August. From all appearances on this record, McCoy and Bockhold collaborated in assisting Mosbaugh, during a time he was not making things easier for them, by having Mosbaugh assigned to SRO school, a highly desirable assignment for a GPC employee with his credentials. Whatever could have been their private motivations for doing so, it was an assignment favorable, not adverse, to Mosbaugh's career interests.

Ultimately, I conclude that Complainant has not established that Respondent has violated the whistleblower protection provisions of the Energy Reorganization Act, and, accordingly, I recommend that these complaints be dismissed.

RECOMMENDED ORDER

It is ORDERED that the complaints of Allen Mosbaugh in Cases Nos. 91-ERA-1 and 91-ERA-11 be dismissed.

ROBERT M. GLENNON

Administrative Law Judge <% if TemplateUse = "primary" then %> <% end if %>