



Issue Date: 09 November 2004

CASE NO.: 2004ERA00024

IN THE MATTER OF:

MARK G. WILLIAMS,
Complainant,

v.

INDIANA MICHIGAN POWER COMPANY,
Respondent.

ORDER
(1) DENYING NON-PARTY FLORIDA POWER & LIGHT COMPANY'S MOTION
TO QUASH SUBPOENA
AND
(2) GRANTING ALTERNATE MOTION FOR A PROTECTIVE ORDER

Background

Florida Power & Light Company (hereinafter "FPL"), by an October 19, 2004 Motion to Quash Subpoena or in the Alternative Motion for Protective Order, with Incorporated Memorandum of Law, moves to quash an October 1, 2004 subpoena from Indiana Michigan Power Company, the Respondent in this case. FPL is a not a party in the above-titled case. The Respondent mailed FPL a subpoena seeking production, inspection, and copying of documents. FPL presented a well-argued motion contending that the subpoena should be quashed since FPL believes that an administrative law judge (ALJ) does not have authority to issue a subpoena to a non-party. In the alternative, FPL submits that it is entitled to a Protective Order since the documents sought are subject to confidentiality agreements.

The Respondent, by an October 29, 2004 Answer in Opposition to FPL's Motion, contends that the Administrative Review Board ("ARB"), by their decision in Childers v. Carolina Power & Light Co., ARB No. 98-077, ALJ No. 97-ERA-32 (ARB Dec. 29, 2000), has "ruled unambiguously that ALJs have subpoena power in proceedings under the EPA." The Respondent also states that the ARB made no distinction between parties and non-parties. Therefore, the Presiding ALJ should deny FPL's motion to quash the subpoena. Concerning FPL's alternative request for a Protective Order, the Respondent does not oppose issuance of a Protective Order in this proceeding. The Respondent further states that the Complainant and Respondent have agreed to a

Stipulated Protective Order and Confidentiality Agreement that should satisfy FPL's legitimate needs for confidentiality.

Information That Respondent Requests By Subpoena

The subpoena shows that the Respondent requests the following information related specifically to the Complainant:

Request 1: All documents that discuss, refer, or relate to any application for employment submitted by Mr. Williams at either the Turkey Point or St. Lucie nuclear plants;

Request 2: All documents that discuss, refer, or relate to any request for unescorted access to a nuclear power plant submitted by Mr. Williams;

Request 3: All documents that discuss, refer, or relate to any access authorization decision by FPL, including but not limited to:

- a) any information provided by a previous employer;
- b) any interviews of Mr. Williams; and
- c) any appeals of unescorted access denials submitted by Mr. Williams;

Request 4: All documents that discuss, refer, or relate to consideration of Mr. William's application for employment.

Information FPL Collects From Its Employees

Within the form titled "PADS CONSENT" (attached to FPL's motion) the following information is collected from FPL employees. This information may be passed to other entities, such as other licensees and contractors/vendors.

The applicant "understands that the information may be transferred, electronically or otherwise, to other licensees and contractors/vendors or the agents of each. This information may include, but is not limited to

- A. Name and social security number;
- B. Demographic (place of birth and physical characteristics);
- C. Dates when any of the following are completed: background investigation, psychological evaluation, fitness-for-duty testing, suitability inquiry checks;
- D. FBI criminal history;
- E. Dates when unescorted access has been authorized or terminated;

- F. Date of any denial of access and the company holding the relevant information;
- G. Dates associated with FFD follow-up testing, if applicable;
- H. Annual radiation exposure history;
- I. Respiratory equipment qualifications/fit;
- J. Medical qualification for respirator use;
- K. Data concerning training required for unescorted access;
- L. Direction to seek additional information directly from another licensee.

The applicant further states, "I authorize a transfer of such information, electronic or otherwise, to other nuclear licensees and contractors/vendors."

The form also includes the statement that "I understand that upon my written request to FPL/FPLE-Seabrook and at no cost to me, I will be provided, within 10 working days, with a printed copy of the information about me which is stored in the database."

Administrative Review Board Is Controlling Authority

The above titled case arises under the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851, and implementing regulations under 29 C.F.R. Parts 18 and 24. The Administrative Review Board (ARB) is the federal appellate authority that has addressed an ALJ's authority to issue subpoenas under the ERA. See Childers, *supra*.

The federal district court case cited by FPL, Bobreski v. U.S. Environmental Protection Agency, 284 F.Supp. 2d 67 (D.D.C. 2003), is instructive. However, it is not controlling for this case which arises and will be heard in Michigan.

The ARB, in Childers, explains at length the inherent authority and the necessity for ALJs to possess the authority to issue subpoenas to allow parties to fully and completely litigate important legal matters. For example, the above-titled case concerns the ERA, which oversees critical security and safety issues. The ARB further stated in Childers, at p. 9, the following:

The proposition that statutory mandates to provide formal trial-type hearings encompass subpoena authority is entirely consistent with the more general proposition that formal agency adjudications should be conducted much like trials in Article III courts. "[W]hen government agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative those agencies use the procedures which have traditionally been associated with the judicial process. Hanna v. Larche, 363 U.S. 420, 442, 80 S.Ct. 1502, 1514 (1960). "There can be little doubt that the role of the modern . . . administrative law judge within [the APA] framework is 'functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on

proffers of evidence, regulate the course of the hearing and make or recommend decisions.” Butz v. Economou, 438 U.S. 478, 513, 98 S.Ct. 2894, 2914 (1978).

If a person fails to comply with a subpoena, “the party adversely affected by such failure to comply may, where authorized by statute or by law, apply to the appropriate district court for enforcement of the . . . subpoena.” See 29 C.F.R. § 18.24. Thus, with the appropriate federal district court maintaining the power to enforce any such subpoena, a level of review is provided for this process. The ARB, in Childers, at p. 12, further states the following concerning action by the appropriate district court:

If the Court concludes that the information being sought is relevant to the statutory purposes, is reasonably identified, compliance is not unreasonably burdensome, and no constitutional principles are being violated, it must order the subpoenaed party to comply. Continued failure to testify or produce after issuance of the court order is no longer noncompliance with the agency subpoena, but is noncompliance with a court order subject to criminal or civil contempt sanctions.

FPL Permits Release Of Requested Information To Non-FPL Entities

The Respondent’s subpoena seeks information specific to the Complainant, and appears to be the same type of information that FPL requests from its employees. The subpoena does not request information specific to FPL such as trade secret or business information. Instead, the subpoena requests the same or similar information FPL obtains from its employees. FPL also provides notice it may transfer “such information, electronic or otherwise, to other nuclear licensees and contractors/vendors.”

Complainant Has Authority To Request Release Under FPL’s Guidelines

The Complainant has the authority to allow release of the information requested by the subpoena. The FPL form includes the statement to the employee that “I understand that upon my written request to FPL/FPLE-Seabrook and at no cost to me, I will be provided, within 10 working days, with a printed copy of the information about me which is stored in the database.” Since the parties understand that the requested information may be released by the Complainant’s request in any event, there seems to be little benefit to FPL in not cooperating with supplying the information. It appears FPL took this action primarily to protect the privacy interests of its employee. If the Complainant signs a request and release form for FPL – which he is authorized to do under FPL’s notice provision – then FPL will have taken all reasonable action to insure the Complainant’s privacy interests were protected.

Complainant Has Agreed To Protective Order

It is understandable that FPL would object as it has done to the subpoena request to protect the privacy of FPL’s information and that of its employee. In the

alternative, FPL has requested a Protective Order. FPL states in its motion that “FPL respectfully requests that these documents be afforded a Protective Order and shielded from production to Respondent in the event FPL’s Motion to Quash is denied.”

As stated in this Order, FPL’s Motion to Quash is denied. By a November 5, 2004 Protective Order, I approved a joint request for a Protective Order. The information sought by Respondent is personal information about the Complainant. He has joined in requesting the November 5, 2004 Protective Order, finding it appropriate and sufficient to protect his private and personal information. If the information sought by the Respondent is requested by the Complainant from FPL, then FPL would need to provide it to the Complainant, who could then pass it to the Respondent. Therefore, I find the November 5 Protective Order satisfactory to protect the interests of FPL, the Complainant, and the Respondent under these circumstances. Information provided by FPL to the Respondent or to the Complainant will be protected to best extent possible by the Protective Order.

Order

IT IS THEREFORE ORDERED that the FPL’s Motion to Quash Subpoena be denied.

In the alternative, FPL has requested a Protective Order. The Complainant and Respondent have submitted a joint Protective Order, which I approved on November 5, 2004. That Protective Order is attached to this Order. The Protective Order was developed to protect the privacy and confidential matters of the parties to the maximum extent possible. After considering the specific information requested in the Respondent’s subpoena to FPL, and FPL’s submitted protection of information policy, I find that the attached Protective Order satisfies the stated needs of FPL such that FPL does not have justification to not respond to the requested subpoena.

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WILLIAM S. COLWELL
Administrative Law Judge

WSC:bdw