

**DEPARTMENT OF ENERGY CONTRACTOR ATTORNEYS' ASSOCIATION
SPRING 2012 MEETING -- DENVER COLORADO**

April 26, 2012

Internal Investigations: Challenges and Ethical Dilemmas Facing In-house Counsel

Hypothetical

Sally Johnson is the General Counsel for Atomic Power Associates, LLC (“APA”) which operates the Moab Nuclear Processing Laboratory for the National Nuclear Security Administration (“NNSA”). APA runs the Lab for NNSA under a management and operating contract. The APA LLC is comprised of a majority member (51%), All States Contracting, Inc, a large industrial and construction concern, and the University of Western Colorado, which is the minority member in the LLC (49%). Sally is an employee of the University, but is seconded to the LLC to serve as the General Counsel.

Sally’s office receives a hotline tip that employees and managers involved in the nuclear weapons part finishing operation have been falsifying inspection reports and billing for test procedures that were not performed. Rather than calling in outside counsel, Sally decides to conduct the internal investigation using her office’s staff. Here is what she knows:

1. The alleged line employee involved is Tim Robinson. He is an LLC employee and has been employed at the Lab for 19 years. He is alleged to have engaged in the systematic falsification of the “traveler forms” accompanying the nuclear parts and certifying the completion of tests that were never performed.
2. The allegations also contend that Robinson’s senior supervisor, Dr. Beth Harris, knows about Robinson’s falsification of the forms and, in fact, has directed him to engage in the conduct. Dr. Harris is a University employee, and like Sally Johnson, has been seconded to the LLC. Dr. Harris and Sally Johnson are long-time friends from their years of service at the University’s main campus.
3. The hotline tip also asserts that Bufort Summers, the Senior Laboratory Director for Operations is knowledgeable about Robinson’s activities and Dr. Harris’s affirmative direction to falsify the inspection reports. The hotline allegations do not make clear whether Summers has been actively involved in the scheme to falsify the reports or whether he simply has acquiesced in the underlying conduct.
4. Finally, the hotline tip indicates that a large lot of critical nuclear components will be delivered to Robinson’s area next month for final inspection and the person making the tip has asserted that Robinson will be falsifying the inspection documents for those parts.

Sally’s assistant has scheduled interviews with Robinson, Harris and Summers for early next week. After scheduling the interviews, she received a phone call from an Assistant US

Attorney informing her that his office had opened an investigation of certain allegations concerning quality inspection and testing of nuclear parts. He informs Sally that his office, in conjunction with the DOE Inspector General will be issuing a subpoena for documents relating to these issues. In light of these various developments, Sally is questioning how she should best proceed.

Discussion Questions/Issues

1. As General Counsel of the LLC, who does Sally represent? Sally remains an employee of the University but is assigned to the LLC to serve as counsel. As both a practical and ethical matter, what issues does she face?
2. In each instance of Robinson, Harris and Summers, how should Sally handle the interview? Should she conduct the interviews? If not, why not? If so, what issues does she face with respect to each employee? Does she represent them as counsel? How does Sally's personal relationship with Dr. Harris bear on her obligations as General Counsel?
3. Assume that in Robinson's and Harris's interviews both persons confess that they, in fact, have been falsifying the inspection reports. What should or must Sally do with that information? What is the status of that information with respect to the Government's investigation?
4. Assume in Robinson's interview he informs Sally that he has documents concerning the falsified reports on his personal laptop, which he keeps in an unclassified area of the Laboratory, and that he has some hard copies of those documents in his garage at home. What is the status of those documents under the Government's subpoena? Should Sally seek to have Robinson produce those to her office, so they can be provided to the Government?
5. Sally is preparing a written report on the results of her investigation and she is planning to provide a copy of that report to the AUSA and the DOE-IG, as well as to the member representatives to the LLC. What is the effect of disclosure of the report? Would it be a different result if Sally met with the AUSA and IG agents and provided a power point presentation on her findings? Would it change the outcome if the disclosure of findings was made in the context of settlement negotiations?
6. The hotline tip noted the potential for an upcoming lot of nuclear parts being subject to the alleged scheme falsifying inspection reports. What are Sally's obligations with respect to that information?

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