



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D. C. 20555

Comm  
Con

June 28, 1979

MEMORANDUM FOR: Chairman Hendrie  
Commissioner Gilinsky  
Commissioner Kennedy  
Commissioner Bradford  
Commissioner Ahearne

FROM: *RB* Leonard Bickwit, Jr., General Counsel

SUBJECT: SCHWARTZ-COLLINS APPEAL -- AUTHORITY OF THE  
COMMISSION TO MAKE THE GRADE CLASSIFICATION  
DETERMINATIONS

Background

At the Commission meeting of June 25, 1979, Messrs. Schwartz and Collins presented, as one of their grounds for relief, the argument that the Commission lacked the legal authority to reject the EDO recommendations that their positions be classified at the GS-16 level. Petitioners alleged that because the pertinent NRC manual chapter provided that the EDO would make the final grade classification decision, the acts of the Commission on the matter were ultra vires -- beyond the scope of its authority. 1/

Section 161(d) of the Atomic Energy Act, as amended, authorizes the Commission to "appoint and fix the compensation of such officers and employees as may be necessary to carry out the functions of the Commission." Section 161(n) of the same Act authorizes the Commission to delegate functions of this sort to the NRC staff. The Atomic Energy Commission established procedures governing challenges to grade classification determinations and, pursuant to the statutory provisions cited above, delegated to the General Manager the decision whether a position should be classified at the GS-16 level. These review procedures are set forth in Manual Chapter Part 4130. These procedures explicitly provide that "the decision of the General Manager on review shall be final". Part 4130-B, III, 3(c).

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It is undisputed that the concept of ultra vires applies to both corporate and governmental activities. W. Gellhorn and C. Byse, Administrative Law 47-48 (5th ed. 1970).

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On January 20, 1975, the Nuclear Regulatory Commission adopted the AEC manual chapters. See Announcement No. 4. On February 11, 1975, the NRC issued an announcement stating that for purposes of Part 4100 of the Manual, the Executive Director for Operations would exercise the functions formerly exercised by the General Manager. See Announcement No. 17.

The promotion of Messrs. Schwartz and Collins to GS-16 was first recommended by Robert Ryan, Director, OSP, to the Office of Personnel on April 13, 1977. Subsequently, the Commission contracted with DAMANS and Associates to perform an audit of NRC's supergrade positions. The Schwartz and Collins positions were audited as part of this review. The Commissioners were provided copies of the DAMANS Report on January 16, 1978, and the NRC staff submitted a paper to the Commission on February 14 recommending a plan to implement the Report. SECY-78-97. In that paper, staff recommended deferral of classification decisions until staff had an opportunity to analyze the DAMANS Report. The Commission responded on June 5, 1978, directing the EDO to submit recommendations regarding the final classification of positions to the Commission for decision. Memorandum from Chilk to Gossick, dated June 5, 1978.

### Discussion

OGC has reviewed the pertinent law on delegation of authority and believes that petitioners' arguments are without foundation. Even if it were acknowledged that the pertinent Manual language constituted a delegation of authority which required revocation prior to Commission exercise of that authority, 2/ it is clear that the

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We do not, however, acknowledge this. We are hesitant to do so in light of the principle that the Commission is at all times responsible for the actions of the agency and thus must have inherent authority to control those actions. Cf. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI 77-8, 5 NRC 503, 516-517 (1977). A logical corollary of this principle is that all Commission delegations of authority should be construed to the extent possible as preserving the Commission's inherent supervisory powers. The language of the delegation at issue need not be read as the petitioners assert. Instead it is possible to read "final" as used in that delegation as "final for purposes of judicial review." Under the APA, decisions are "final" for such purposes once they are effective and no further appeal as of right lies within the agency. 5 U.S.C. 704; cf. NECNP v. NRC, 582 F.2d 87 (1st Cir. 1978). We do not reach the question of which reading is the preferred one in this case.

authority was revoked for purposes of the matters before the Commission. Adequate revocation may be found both in the Chilk memorandum of June 5, 1978, specifying that the Commission would make final decisions in this area and in the Commission's actions of considering, and in this case rejecting, the Gossick recommendations. 3/

We have identified no case law specifying the means by which an administrative official may revoke authority delegated to a subordinate officer. However, there is a body of case law which can be applied by analogy. The relationship between the EDO and the Commission is analogous to the principles of agency law. The EDO functions as the agent for the Commission, performing "such functions as the Commission may direct". 10 CFR 1.40. It is well established that the authority of the agent is revocable at the pleasure of the principal. See, e.g., Willcox & Gibbs Service Machine v. Ewing, 141 U.S. 627, 637 (1891). Since agency is a consensual relationship, a principal cannot be compelled to retain another as his agent. H. Reuschlein and W. Gregory, Agency & Partnership, 43 (1979). One court has held that the agency relationship may be terminated at any time even though the initial authorization was characterized as "irrevocable". Century Refining Co. v. Hall, 316 F.2d 15, 21 (10th Cir. 1963).

One method by which the principal may manifest termination of consent is by conduct inconsistent with its continuance. Restatement (second) of Agency § 119, Comment b (1958). In accord with the approach of the Restatement, supra, it has been held that an agent's authority is "automatically and necessarily revoked when his principal undertakes to perform the same act". Rodriguez v. Secy. of Treasury of Puerto Rico, 276 F.2d 344, 348 (1st Cir. 1960).

This principle was given early recognition by the Supreme Court in Campbell v. Doe, 54 U.S. [How. 13] 244 (1851). Congress directed the Secretary of the Treasury to select tracts of land to be utilized as school property within certain townships. The Treasury Department subsequently issued a circular effectively assigning the selection authority to the Commissioner of the General Land Office. In Campbell a tract of land originally selected was later withheld by the Commissioner and offered to a private party. The trustees of the school district appealed directly to the Secretary of the Treasury who overturned the decision of the Commissioner. The

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Had the original delegation been by rule, it is arguable that these actions would not have constituted a revocation. As a general proposition, what is done by rulemaking can only be undone (or amended) by rulemaking. 5 U.S.C. 551(5). It might then have been necessary to reach the question raised in the previous footnote.

Court noted that the ultimate responsibility and authority remained with the Secretary. The Court held that when authority is delegated by Congress, although it may be performed through a subordinate, "where the Secretary has interposed and decided the matter ... his decision must be considered the only one under the law." 54 U.S. at 249. Similarly, the interposition of the Commission into a matter within the delegated authority of the EDO must be considered as valid and conclusive.

The Campbell case illustrates that no particular formalities are required for revocation of the agency relationship. H. Reuschlein and W. Gregory, supra. As discussed above, on June 5, 1978, Secretary Chilk, acting on behalf of the Commission, sent a memorandum to the EDO regarding the DAMANS study which stated that the Commission directed the EDO to submit his recommendations to the Commission for final actions. (emphasis supplied). This memorandum constituted an explicit revocation of the EDO's authority over the supergrade classification question. Necessarily, once the EDO's authority had been revoked in that regard, the Commission resumed its normal plenary authority over this agency personnel matter. Actions taken by the Commission in the exercise of this authority reinforced the earlier revocation.

As a final matter, whatever the Commission's views on the matters discussed above, it is beyond dispute that it may now revoke any remaining delegation of authority by revising the pertinent manual chapter. The revisions could be made immediately effective, since none of the procedural requirements of the APA apply in this instance. Section 553(a)(2) of that Act expressly exempts from such requirements matters "relating to agency management or personnel". Having amended the manual, the Commission could then decide the Schwartz-Collins classification appeals pursuant to the authority thus established. We believe this approach unnecessary, however, since, for the reasons set forth above, the relevant authority already resides in the Commission.