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NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

PUBLIC MEETING
DISCUSSION OF PERSONNEL MATTER

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U.S. DEPARTMENT OF JUSTICE

Place - Washington, D. C.

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CR5617

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

PUBLIC MEETING

DISCUSSION OF PERSONNEL MATTER

Room 1110
1717 H Street, N. W.
Washington, D. C.

Monday, 25 June 1979

The Commission met, pursuant to notice, at 9:45 a.m.

BEFORE:

- DR. JOSEPH M. HENDRIE, Chairman
- VICTOR GILINSKY, Commissioner
- RICHARD T. KENNEDY, Commissioner
- PETER A. BRADFORD, Commissioner
- JOHN F. AHEARNE, Commissioner

ALSO PRESENT:

Messrs. Bickwit, Schwartz, Collins, Gossick, and Ryan.

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P R O C E E D I N G S

(9:45 a.m.)

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CHAIRMAN HENDRIE: On a personnel matter, we have with us Mr. Schwartz and Mr. Collins who have asked to talk to the Commission about a decision which we made sometime ago with regard to grades, coming out of the Commission's review of the super grade audit.

I think the best approach is to let you go ahead and frame the proposition as you would like to put it to us.

MR. SCHWARTZ: Thank you, Mr. Chairman.

COMMISSIONER KENNEDY: Before you begin as petitioners, have you taken counsel? And if so, is your counsel present?

MR. SCHWARTZ: We have not taken counsel, sir.

COMMISSIONER KENNEDY: Thank you.

MR. SCHWARTZ: Mr. Chairman and Commissioners, we thank you for giving us the opportunity to meet with you today about a petition to the Commission for reconsideration and redress, which we filed with you on June 1, 1979, concerning the classification of the positions we currently occupy.

In our view, the Commission has acted in an arbitrary and capricious manner because, on February 7th of this year, the Commission rejected the recommendations and validly made determinations on these classifications by

1 one, the Director of the Office of State Programs; two, the
 2 Director of the Personnel Office; three, the report of
 3 damon and Associates of December 30th, 1977; four, the
 4 Director of the Office of Administration; and five, the
 5 Executive Director for operations.

6 These recommendations and determinations which
 7 were, in our judgment, arbitrarily and capriciously set
 8 by the Commission on February 7th, 1979, all came to the
 9 same conclusion, that the positions of Assistant Director
 10 for Emergency Preparedness and Assistant Director for Program
 11 Development in the Office of State Programs should be
 12 GS-16s.

13 This attempt by the Commission to upset this
 14 string of recommendations and determinations is personally
 15 damaging to Mr. Collins and myself. Because if these
 16 positions are not graded at GS-16, it denies Mr. Collins and
 17 myself the opportunity to consider joining the Senior
 18 Executive Service, which becomes effective on July 13th,
 19 1979.

20 As you know, substantial benefits flow to the
 21 individuals who become members of the SES upon its creation,
 22 not only through bonuses and pay, but they are presumed
 23 qualified for membership without further investigation or
 24 certification by the Office of Personnel Management.

25 We believe the two positions should be GS-16, and

1 we think there is ample justification for reaching such a
2 conclusion. But it is not our intention today to make such
3 an argument on the merits. In our judgment, there is no
4 need to reach that question. Our belief is that the question
5 has already been decided by the actions of Mr. Ryan, by the
6 Damon study, by the Office of Personnel, by the Director of
7 Office of Administration, and the Director of operations.

8 In setting aside the collective judgment of these
9 individuals and organizations, the Commission, we believe,
10 has acted in an arbitrary and capricious fashion and has
11 denied us substantial rights to which we are entitled by
12 virtue of the statutes under which the Commission operates.
13 And, more importantly, the rules under which the Commission
14 currently functions.

15 In a nutshell, our argument is that the
16 Commission lacks authority to set aside the determinations
17 on these grade classifications made by your Office of
18 Personnel, your own Office of Administration, and your own
19 Executive Director for Operations.

20 We have prepared a booklet for each of the
21 Commissioners which I would like to have distributed at this
22 time.

23 (Distributing documents to Commissioners.)

24 The Commission should have some background on
25 this whole matter. I am going to try to lay it out for you

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1 in chronological order. Referring back to the documents
2 contained in this booklet, I will be referring to the
3 documents contained in it as we present our evidence.

4 The question of whether these positions should
5 be classified as GS-16 antedates the Damon study by about
6 three months. It goes back at least as far as April 13th,
7 1977. At that time, Mr. Ryan, Director of the Office of
8 State Programs, wrote a letter to Mr. Tim Dircks, who was
9 at that time the Personnel Management Analyst for the Office
10 of State Programs.

11 I would like at this time to ask Mr. Ryan to
12 explain to the Commission that letter, and subsequent
13 correspondence. The letter is found in Tab A of the
14 booklets.

15 MR. RYAN: Mr. Chairman, when I came to the
16 Office of State Programs in 1976, Mr. Schwartz and
17 Mr. Collins had an "acting" before their names. That
18 "acting" was removed late in 1976, and partly on my own
19 motion, and also partly in response to requests from
20 Mr. Collins and Mr. Schwartz.

21 I inquire into the question of the grade
22 classification for the slots which they occupy. On April
23 13th, 1977, I wrote a letter to Mr. Tim Dircks, who was
24 the personnel fellow responsible for our office at that
25 time. And I said: During the performance evaluations

1 recently concluded, I mentioned to Lee Gossick that it was
2 my intention formally to urge Harold Collins and Sheldon
3 Schwartz of this office to be promoted from GS-15 to GS-16.

4 "Mr. Gossick supports my intention, provided the
5 positions justify a Grade 16 from the personnel viewpoint,
6 and provided the super grade slots are available.

7 "This then is a declaration on my part that these
8 gentlemen deserve promotion, and that as far as I am
9 concerned the offices which they occupy ought to be filled
10 by Grade 16s.

11 "I wonder if you would advise me on what paperwork
12 might be involved. We will assist you in any way, as you
13 make your examinations of the functions, the benchmarks,
14 et cetera." As usual, Ms. Janinek will help you if I am not
15 available during the next few weeks."

16 On August 12th, 1977, I sent a note to Mr. Dircks
17 and said, "I am enclosing the updated descriptions for the
18 two Assistant Directors for the Office of State Programs,
19 Harold E. Collins and Sheldon A. Schwartz. Would you have
20 these reviewed and evaluated for appropriate classification.
21 In my opinion, the responsibilities involved are such that
22 both positions should properly be classified as GS-16 rather
23 than the current GS-15. If Personnel's review bears this
24 out. I would want it to be a matter of record so that both
25 Mr. Collins and Mr. Schwartz would be considered for

1 promotion when supergrade slots become available."

2 There is a note on the top of that paper from
3 Ms. Janinek in our office: "Returned by Tim Dircks to
4 resubmit in supergrade format."

5 On November 7th, 1977, I wrote a memorandum to
6 Calvin Jones which said: "As requested by Tim Dircks, the
7 personnel analyst for this office, I am enclosing position
8 descriptions in the supergrade format for the Assistant
9 Director of State Programs for State Program Development,
10 and the Assistant Director for Emergency Preparedness. I
11 understand that these positions -- these two positions --
12 will be included in the supergrade audit of this office
13 which will be conducted within the next few days."

14 We had a handwritten note back from Tim Dircks
15 to Marie Janinek dated 11/9/77, November 9, 1977: "Marie,
16 thanks so much for your timely submittal of the supergrade
17 position descriptions. They look good and should be helpful
18 to the auditors."

19 During the third week of November 1977, I spent
20 time with Damon Associates as part of their review of our
21 office. I discussed for about two hours the -- with the
22 Damon people, the position descriptions for Mr. Schwartz's
23 and Mr. Collins' slots.

24 Damon came back the following week and we
25 discussed it again for a short time.

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1 MR. SCHWARTZ: Thank you, Mr. Ryan. Let me talk
2 a minute about the Damon study.

3 Mr. Ryan said he spent, I guess, two hours with
4 Damon. Mr. Collins and I also spent about two hours each
5 with Damon's representatives during their first visit in
6 November 1977.

7 On the second visit about two weeks later, we spent
8 another hour each talking to Damon. The Damon study was
9 completed December 30th, 1977, and was transmitted to the
10 Commission on January 16th, 1978.

11 You will find this letter and pertinent excerpts
12 from the study at Tab A in your book. Basically, the Damon
13 study found that the positions in question should be
14 classified as GS-16, after a rather extensive investigation.

15 I had hoped to have representatives from Damon
16 Associates here today to qualify them as experts on
17 personnel matters and to question them on how they arrived
18 at their judgment, but unfortunately they are not able to
19 be with us.

20 On June 22nd, I sent Mr. Casine, a partner of
21 Damon's, a telegram, a copy of which is found at Tab C,
22 inviting him to join us. He informed me that he was unable
23 to attend. I have of course no subpoena power available to
24 me at this time by which I could compel his attendance,
25 but I presume that the Commission, having hired Damon's, is

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1 prepared to stipulate to its expertise in the area of
2 personnel management.

3 On February 14th, 1978, there was a Commission
4 action paper, 78-97, found at Tab D in your books, which
5 requested Commission approval for a plan to implement the
6 supergrade audit report from Damon's. It discusses the need
7 for additional supergrade positions, and recommends that
8 NRC fill supergrade positions within the then-existing
9 Office of Management and Budget ceiling of 210.

10 On page 4, I quote: "Priorities affecting these
11 promotions will be established by the EDO." The positions
12 we are talking about here today are included in that paper
13 at page 3, "30 positions at GS-15 recommended for GS-16."

14 The paper also dealt with downgradings recommended
15 by Damon's setting up positions evaluation review committee,
16 PERC, to hear complaints from individuals who were aggrieved
17 by the Damon's report, and ways to improve the supergrade
18 evaluation system.

19 On May 4th, 1978, Mr. Donoghue wrote to Mr. Ryan.
20 The exchange of correspondence is found at Tab E.
21 Mr. Donoghue told Mr. Ryan and other office directors that
22 the Office of Personnel concurred in the contractor's
23 recommendations to upgrade the two positions in question
24 but that, "relatively low priority should be assigned to
25 the recommended upgradings."

1 Mr. Ryan wrote back to Mr. Donoghue on May 10th,
2 "Thank you for your memo of May 4th, and for your support
3 of the contractor's recommendations that the Assistant
4 Director for Emergency Preparedness, Mr. Collins, and
5 Assistant Director for State Program Development, Mr. Schwartz,
6 deserves the classification of GS-16 rather than GS-15."
7 The memo goes on to state, "Relatively low priority should
8 be assigned to the recommended upgradings."

9 Mr. Ryan went on to say, "Naturally, I do not
10 support that recommendation. I am, however, unable to offer
11 the best possible arguments in support of this recommendation
12 because I do not have access to the priority rankings assigned
13 to other positions. I understand that those rankings
14 necessarily involve judgments on your part which are, and
15 in my view ought to be, confidential in nature. Since I
16 cannot then compare the merits of these upgradings with
17 upgradings elsewhere in the agency, I must simply assert that
18 the recommended upgradings for our office are important and
19 are justifiable and ought to be assigned high priority."

20 At Tab F you will find Mr. Chilk's memo of June
21 5th, 1978, describing the Commission decision on SECY-78-97,
22 which among other things, "deferred any personnel actions
23 recommended in the Damon's report pending appropriate staff
24 review."

25 233 183 The PERC was established on June 22nd, 1978. All

1 of the memos we know about concerning it are found at
2 Tab G.

3 On July 20th, 1978, we wrote to Mr. Minogue as
4 the Chairman of PERC about the supergrade audit. We said,
5 "Your memo explaining the purpose of the Position Evaluation
6 Review Committee, and inviting notices of intent to appeal,
7 is most welcome. While we are not contesting the basic
8 findings of the Damon Study and the organization and personnel
9 concurrence, we are concerned about the low priority
10 recommended for the position upgradings. It seems a little
11 bit out of balance to recommend immediate upgradings of
12 empty bullets and hold off on those positions currently
13 held. The corollary then would be that the Assistant
14 Directors for Emergency Preparedness and Program Development
15 would be GS-16s if we were not in these positions, which we
16 are and, parenthetically, kind of like a Catch-22.

e-1

b-2

17 "We therefore request, if it is the appropriate
18 function of your Committee, that the Committee recommend
19 that high priority be assigned to our upgradings."

20 This letter was never acknowledged or answered
21 by Mr. Minogue. Our Freedom of Information Act request of
22 June 4th, 1979, however, gave us access for the first time
23 to a document dated September 11th, 1978, which does touch
24 upon our letter.

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25 Mr. Minogue wrote to Mr. Gossick as follows:

1 "Several other notices of intent to appeal were
2 received where the appeals would have been based on questions
3 involving organizational alignment, position management or
4 timing of upgrades. These appeals were determined to be
5 outside the scope of the Committee's review. A list of
6 positions involved in such appeals is found in Attachment 3,
7 along with the grounds for the appeal."

8 Mr. Collins' and my concerns were included in
9 that category.

10 On September 22nd, 1978, Mr. Gossick sent forward
11 a Commission Action Paper, SECY 78-97(A), which is found at
12 Tab H in your books. This paper contains a curious anomaly.
13 The paper formally requests Commission approval on the
14 classification of "contested supergrade positions." It
15 recommends the 23 positions currently at Grade 15 be Grade 16.

16 I say it contains a curious anomaly because the
17 two positions at issue here today were not contested. In
18 fact, we very much approved of the DAMANS recommendation, and
19 the recommendation by Mr. Gossick contained in this paper,
20 and the prior paper.

21 The paper also deals with the requirement for
22 additional supergrade positions, and I quote, "It has now
23 been determined and presumably by the Personnel Office and
24 Mr. Gossick that 236 supergrade positions are required to
25 meet the Agency's current and foreseeable supergrade and

1 SES needs. This would require an increase of 28 in the
2 Agency's ceiling from OMB."

3 Mr. Gossick's recommendation is, "The Commission
4 approved all proposed promotions resulting from the
5 supergrade study which are possible within the supergrade
6 ceiling."

7 On September 22nd, 1978, I had a conversation with
8 Mr. Gossick about this same subject. I had just returned
9 from an NRC Management Training Seminar at Harper's Ferry,
10 West Virginia, where the establishment of the SES was
11 discussed.

12 I learned at that time that the Service would be
13 put in place on January 1, 1979. My discussion with
14 Mr. Gossick concerned the disposition of the supergrade
15 audit, and the determination by DAMANS and Mr. Gossick that
16 my position be upgraded to GS-16.

17 Mr. Gossick replied that he supported the
18 upgradings in the Commission Action Paper, and the only issue
19 was whether or not there were enough supergrade slots allocated
20 to NRC by OMB.

21 Mr. Gossick, is that essentially the sum and
22 substance of our conversation?

23 MR. GOSSICK: That's right.

24 MR. SCHWARTZ: Thank you.

25 On November 30th, 1978, Mr. Donoghue asked

1 Mr. Ryan and other office directors for estimates of
 2 supergrade needs for the next 2-1/2 years. Mr. Ryan replied,
 3 on December 8th, as follows:

4 "At present, our projected needs will be three
 5 additional supergrades. As you know, Mr. Kerr and I are the
 6 only people in the office presently in supergrade categories.
 7 The DAMANS Study recommended supergrade status for
 8 Mr. Schwartz and Mr. Collins. I had previously recommended
 9 the promotion of both of these gentlemen, and naturally I
 10 support the DAMANS Study recommendations. Those recommenda-
 11 tions presumably will be acted upon sometime before
 12 October 1981, and we will need two supergrade slots to
 13 accommodate them."

14 Mr. Ryan continued, "It is important, in my view,
 15 that each of these individuals become eligible for membership
 16 in the new Senior Executive Service. They are the kind of
 17 individuals who would serve with distinction in that
 18 Service. Each is a highly competent executive, seasoned by
 19 many years of experience and of responsible service to our
 20 country. Their presence in the SES would be a great credit
 21 to our agency."

22 These documents are found at Tab I in your books.

23 On March 26th, 1979, Mr. Collins and I received
 24 identical letters from Mr. Gossick, dated March 23rd, which
 25 said, "The Commission has now completed its review of

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1 recommendations from DAMANS and Associates, the Division
2 of Organization and Personnel, the Position Evaluation and
3 Review Committee (established especially to hear appeals in
4 contested cases), and the Executive Director for Operations.

5 "It has been determined that your present
6 position is properly evaluated at its current grade level.
7 Your patience and cooperation through this lengthy process
8 has been appreciated."

9 This letter is found at Tab J.

10 This "decision of the Commission" was of course
11 completely unexpected. Throughout this entire transaction
12 at each stage, at each review, the various actors had
13 supported Mr. Ryan's original contention back in April 1977
14 that the positions which we occupied should be graded at the
15 level of GS-16.

16 The "Commission decision" was a clear repudiation
17 of those judgments and those determinations. We had been
18 led to believe that the only problem was the availability
19 of supergrade positions which were or could be authorized
20 by OMB or OPM.

21 We immediately tried to sort out those numbers
22 and to determine on what basis the Commission reached its
23 "decision."

24 We had a conversation with Mr. Donoghue on
25 March 27th. We found out that the Office of Personnel

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1 Management had allocated to the Agency 251 positions,
2 supergrade positions. Mr. Donoghue did not believe that
3 the Commission was aware of this allocation at the time it
4 had passed on this matter on February 7th.

5 Mr. Donoghue was not aware of how the Commission
6 had reached its decision, what criteria it had used, or
7 whether a formal meeting had been held.

8 Mr. Donoghue told us that the "Commission decision"
9 was transmitted to Mr. Gossick by memo sometime in February.
10 He suggested we talk to Mr. Dorie, the Chairman's assistant.

11 I would like to ask Mr. Bird a question.
12 Mr. Bird, can you tell us how many unassigned supergrade slots
13 are available right now, by virtue of the OPM allocation?

14 MR. BIRD: At this time, there are 10 allocated
15 SES positions.

16 MR. SCHWARTZ: Thank you.

17 On the same day, I spoke to Mr. Dorie and asked
18 for the "Chairman Hendrie-Gossick memo," and any records
19 concerning Commission meetings or records of criteria
20 employed by the Commission.

21 Mr. Dorie was not sure whether the Commission had
22 had a meeting, but promised to get back with me with any
23 information he could unearth.

24 On April 6, we received the February 13th memo
25 from Chairman Hendrie to Mr. Gossick. This is found at
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1 Tab K. It consists principally of lists, but does not show
2 how the decisions -- "decisions" -- were made. We made an
3 informal written request on May 4th to Chairman Hendrie for
4 any or all records relating to the "Commission decisions."
5 It is found at Tab L in your book.

6 As a result of this request, we were furnished
7 edited copies of the transcripts of the Commission meeting
8 of February 7th concerning the discussion of our two
9 positions. They are also found at Tab L.

10 Mr. Chilk's memo transmitting the transcriptions
11 on May 24th is also found at Tab L. It states, and I quote:
12 "It is my understanding that no documentation exists regarding
13 the decision criteria used by the Commission."

14 Naturally, Mr. Chairman and Members of the
15 Commission, we are upset by this communication. We began at
16 once to inquire into the propriety of the "Commission
17 decision." And we examined the rules and regulations under
18 which the Commission operates to determine whether that
19 "decision" was lawful.

20 The lawyers have a phrase, Mr. Chairman, "ultra
21 vires." Black's Law Dictionary defines it as follows:
22 "The modern technical designation, in the law of
23 corporations, of acts beyond the scope of the powers of a
24 corporation, as defined by its charter or act of incorpora-
25 tion. ... The term has a broad application and includes not

1 only acts prohibited by the charter, but acts which are in
2 excess of powers granted and not prohibited. ... [It is]
3 generally applied either when a corporation has no power what-
4 ever to do an act, or when the corporation has the power but
5 exercises it irregularly. ... [An] act is 'ultra vires' when
6 [a] corporation is without authority to perform it under any
7 circumstances or for any purpose." This definition is found
8 at Tab M, with appropriate citations.

9 Webster's New Collegiate Dictionary defines
10 "ultra vires" as "beyond the scope or in excess of legal
11 power or authority."

12 Mr. Chairman, Members of the Commission, in
13 rejecting the determinations and recommendations of the
14 Director of the Office of State Programs, the Office of
15 Personnel, the Director of the Office of Administration, and
16 the Executive Director for operations, it is our contention
17 that the Commission has acted ultra vires. That is, beyond
18 its powers.

19 In short, the Commission had no authority under
20 its statutes or its rules to do what it attempted to do.
21 Let me try and explain why.

22 When the NRC was created on January 1st, 1975,
23 the Nuclear Regulatory Commission adopted the Atomic Energy
24 Commission Management Directive System, including a document
25 known as "Part 4100," which deals with personnel action,

1 authorities and responsibilities. I direct your attention
2 to NRC Announcement No. 4, January 20th, 1975, found at
3 Tab N. On February 11th, this was further clarified by
4 NRC Announcement No. 17, found at Tab O, which says that,
5 "The personnel management authorities and responsibilities
6 assigned to the former AEC General Manager were now the
7 authorities and responsibilities of the NRC Executive
8 Director for Operations."

9 The personnel management authorities and
10 responsibilities of the former Assistant General Manager of
11 AEC were assigned to the NRC Director of the Office of
12 Administration. And the personnel management authorities
13 and responsibilities of the AEC Director of the Division of
14 Personnel were assigned to the NRC Director of the Division
15 of Organization and Personnel.

16 These assignments of responsibility have never
17 been amended or superceded. Mr. Donoghue, is that correct?

18 MR. DONOGHUE: Yes, that's correct.

19 MR. SCHWARTZ: The former AEC Manual, Chapter 4100,
20 includes Appendix 41.30, and is currently operative, and has
21 never been superceded. Is that also correct?

22 MR. DONOGHUE: Yes.

23 MR. SCHWARTZ: Section 41.30 is contained in your
24 book at Tab P. Under this section, the final arbiter of
25 personnel actions, including job classifications, is the AEC

1 General Manager. Mr. Gossick has succeeded to these
 2 responsibilities by virtue of Announcement No. 17 of February
 3 11th, 1975.

4 Therefore, Mr. Gossick is the final arbiter of
 5 personnel actions under the rules currently in force in this
 6 agency. No role of any sort is described under these
 7 regulations for the Commission as a Commission, as "the
 8 Commission."

9 Mr. Gossick has made a decision. He has told the
 10 Commission that these positions shall be graded at the level
 11 of GS-16. In doing so, he has accepted the recommendations
 12 of Mr. Ryan, Mr. Bird's predecessor, Mr. Jones, and
 13 Mr. Donoghue.

14 We put it to you, Mr. Chairman and Members of
 15 the Commission, that the Commission under its own rules has
 16 no authority or right to reject this decision. To do so
 17 would be a violation of its own rules that would cause
 18 Mr. Collins and myself irreparable injury.

19 The attempt of the Commission to set aside these
 20 determinations was an ultra vires act.

21 COMMISSIONER BRADFORD: If we accept the point,
 22 we would simply drop all the Commission actions and leave
 23 EDO's actions in effect; not just as to you?

24 MR. SCHWARTZ: Could I get to that later, sir?

25 COMMISSIONER BRADFORD: Yes.

1 MR. SCHWARTZ: Further, it seems to us that since
2 there is no role for the Commission itself in determining
3 personnel position classifications, or in overruling the
4 determinations of those charged with this responsibility under
5 NRC personnel regulations, there should -- there never should
6 have been Action Papers submitted to the Commission implying
7 that the Commission had a role in these matters. At best,
8 only Information Papers informing the Commission --

9 COMMISSIONER KENNEDY: Could I interrupt you,
10 there?

11 MR. SCHWARTZ: Yes, sir.

12 COMMISSIONER KENNEDY: How, then, does one explain
13 that the very person your thesis alleges has been vested
14 with all responsibility apparently believed that the
15 Commission retained some, since he is the one who sent the
16 paper forward?

17 MR. SCHWARTZ: Could we hold that until I get
18 finished with this?

19 COMMISSIONER KENNEDY: Certainly.

20 MR. SCHWARTZ: Perhaps it is a question that
21 someone else would like to address, because I had no part in
22 putting that paper together.

23 COMMISSIONER KENNEDY: Certainly.

24 MR. SCHWARTZ: At best, only information papers
25 informing the Commission of the personnel classification

1 actions should have been sent to you. The Commission could
2 very well affirm personnel actions taken by Mr. Gossick, but
3 the Commission lacks any authority to overrule such
4 determinations under its own rules.

5 The idea of a collegial body such as the
6 Commission voting on individual personnel position classifi-
7 cations as determined by those charged with this responsi-
8 bility under its rules is in our view absurd on its face.

9 Undoubtedly it was for this reason that the AEC
10 vested this responsibility in the former AEC General
11 Manager, not in the AEC Commissioners. This authority is
12 now Mr. Gossick's authority in the NRC.

13 Our Freedom of Information requested dated June
14 4, 1979 -- and this is found at Tab Q -- has produced no
15 document which in any way alters our view. Presumably, if
16 such a document were in existence, it would have been
17 produced pursuant to our request.

18 Further, even if the Commission had a role to
19 play in the matters we have been discussing, the transcript
20 of the Commission's deliberations on all position classifica-
21 tions is, in our view, superficial and cursory.

22 On June 1, 1979, Mr. Collins and I filed a
23 petition for reconsideration and redress with the Commission.
24 This is found at Tab R.

25 COMMISSIONER GILINSKY: Could I ask a question
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1 here? If in fact the Commission has no authority here, why
2 aren't you filing -- raising the entire matter with
3 Mr. Gossick? There seems to be an inconsistency here.

4 MR. SCHWARTZ: Can I take that question after we
5 go through this, sir? There is only a short amount of time,
6 and I want to make sure I get through the statement, first.

7 This is found at Tab R. The petition reads as
8 follows, starting at paragraph 18, "Your petitioners at
9 this time do not wish to go to the trouble and expense of
10 litigation. Before seeking a remedy of the courts, your
11 petitioners believe that the Commission should have the
12 opportunity to correct its mistake.

13 "Your petitioners have no desire to embarrass the
14 Commission, nor do your petitioners wish to be forced into a
15 position of deposing the individual Commissioners and staff
16 members under oath to probe their motives, rationale, or
17 decision making for prejudicial misconduct.

18 "Your petitioners do not intend at this time to
19 bring this matter before the Office of Personnel Management.
20 On the contrary, your petitioners believe that this matter
21 can and should be disposed of by the Commission, and that
22 this mistake can best be rectified in-house.

23 "In order to preserve their rights," the petition
24 continues, "your petitioners are making a formal request
25 under the Freedom of Information Act for access to material

1 previously requested but not yet supplied."

2 COMMISSIONER KENNEDY: Can you tell me to what that
3 specifically referred?

4 MR. SCHWARTZ: Sir?

5 COMMISSIONER KENNEDY: To what did that refer?

6 MR. SCHWARTZ: The petition?

7 COMMISSIONER KENNEDY: No, no, the formal request
8 for access to material previously requested but not yet
9 supplied.

10 MR. SCHWARTZ: In the May 4th memo, sir, to
11 Mr. Hendrie, we asked for all records, transcripts, tapes,
12 and anything having to do with the decision by the Commission.

13 After reviewing the tapes and transcripts that
14 we received, it seemed obvious to us there were other
15 documents that we had not received. And at that time, we
16 decided to put in a Freedom of Information Act request.

17 COMMISSIONER KENNEDY: Did you compile a list of
18 those other documents?

19 MR. COLLINS: We couldn't do it because we didn't
20 know what they were.

21 MR. SCHWARTZ: We didn't know what those other
22 documents were.

23 COMMISSIONER KENNEDY: I see. Thank you.

24 COMMISSIONER BRADFORD: You knew enough to know
25 that there were documents you hadn't received, so you must

1 have described them. You did in fact describe them. Are you
2 referring to a list of Commissioner Ahearne's and
3 Commissioner Kennedy's?

4 MR. SCHWARTZ: That's correct.

5 "In order to preserve their rights, your
6 petitioners are making a formal request under the Freedom of
7 Information Act for access to material previously requested
8 but not yet supplied.

9 "Now, therefore, your petitioners respectfully
10 petition the Commission to: (1) overturn and reverse
11 forthwith the decision of February 7th, 1979, which we
12 believe arbitrarily and capriciously denied your petitioners
13 the position classification to which they are entitled --
14 that is, GS-16 -- and which decision has had the effect of
15 denying your petitioners the opportunity to consider
16 membership in the Senior Executive Service;

17 (2) Alternatively grant your petitioners the
18 opportunity to be heard to present evidence on their behalf"--
19 and I thank the Commission for this meeting.

20 "(3) Your petitioners pray for speedy disposition
21 of this matter. That is, the decision on this petition, by
22 June 30, 1979. Time is of the essence, since decisions
23 concerning entry into the Senior Executive Service must be
24 made within the week of July 13th, 1979, the day on which
25 the Service comes into formal existence."

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1 Mr. Chairman and Members of the Commission, we
2 are now renewing our petition to -- quote -- "We are now
3 renewing our petition by bringing this matter to your
4 attention. We have no intention of impeaching any other
5 action the Commission may have taken on February 6th or 7th
6 regarding personnel upgradings or downgradings."

7 Of course the Commission may, on its own motion,
8 want to inquire into that matter based on the evidence we
9 have presented here today, but basically our purpose is to
10 seek redress on what we regard as a wrongful act by the
11 Commission on the positions which we now occupy.

12 We therefore ask you again today to set aside
13 your "decision" of February 7th as they apply to the
14 positions we now occupy in a timely fashion. We know from
15 Mr. Bird's statement that the Commission has the supergrade
16 slots available. We are calling upon you now forthwith to
17 correct your mistakes and allow Mr. Gossick's determination
18 to stand.

19 We ask you to instruct him forthwith to assign
20 supergrade slots to the positions we now occupy.

21 Thank you for your time and attention.

22 CHAIRMAN HENDRIE: Okay. We have several pending
23 questions. Let me ask the Commissioners to remember the
24 queries they had, and let me start with Peter. I think
25 yours was the earliest.

1 COMMISSIONER BRADFORD: You touched on it.

2 MR. SCHWARTZ: Yes, sir.

3 COMMISSIONER BRADFORD: My question was: If we
4 accepted your logic, it did seem as though the effect of
5 whatever action we took would have to -- would be to leave
6 the EDO decisions in effect agencywide, and not just as with
7 your two positions.

8 MR. SCHWARTZ: We are suggesting, based on what we
9 presented, that you might want to look into that. Our main
10 purpose here is only our two positions.

11 CHAIRMAN HENDRIE: Len, would you care to comment
12 on the decision that the Commission is --

13 MR. BICKWIT: I wouldn't care to comment on the
14 rule, because I haven't read the rule. Would you read it --

15 COMMISSIONER KENNEDY: I was intrigued to note
16 some language which says, "February 11th Announcement No. 17,
17 This memorandum interprets how the delegation of personnel
18 action authority and assignments of responsibility as stated
19 in Part 41 are to be implemented throughout the Commission."

20 So when you do look at it -- which I request you
21 do -- would you interpret that specific language, as well?

22 COMMISSIONER AHEARNE: We have had EDO or ELD
23 examine that?

24 MR. GOSSICK: We have not discussed this. We
25 haven't been approached by Mr. Schwartz prior to this

1 meeting. It is a new argument, as far as I am concerned.
2 I hadn't really questioned the authority of the Commission
3 to review such actions.

4 I certainly agree that it should be examined from
5 a legal standpoint, and the validity of the argument be
6 assessed.

7 COMMISSIONER KENNEDY: The question I asked, it
8 seems to me that your argument has two aspects: One, the
9 argument that the Commission acted improperly -- that is,
10 ultra vires?

11 MR. SCHWARTZ: That is correct.

12 COMMISSIONER KENNEDY: On the other hand, I think
13 it was indicated that, aside from that, were it to be
14 determined that it did act within its powers, it did so
15 capriciously.

16 MR. SCHWARTZ: That is exactly our point.

17 COMMISSIONER KENNEDY: That is a different point.

18 MR. SCHWARTZ: That's correct, sir.

19 MR. COLLINS: That's correct.

20 COMMISSIONER KENNEDY: Thank you.

21 CHAIRMAN HENDRIE: If not capriciously, at least
22 failed to understand all of the aspects of the jobs which
23 you hold, and the arguments which you have presented to
24 support supergrade level titles for these positions.

25 I would point out to you that I doubt that the

1 totality of Commissioner consideration and the recommendations
2 of the DAMANS report, and various staff documents, forwarding
3 and reviewing these determinations, is review of a collegial
4 media. That is, Commissioners, to greater or lesser degrees,
5 studied the audit reports and the recommendations of the
6 Executive Director as to the DAMANS study results, formed
7 various opinions as to the evaluation of various positions.
8 When we meet collegially after sometime on the matter, then
9 the thrashing out of where the Commission collegially stands
10 on each of those matters doesn't by any manner or means
11 necessarily exercise all of the arguments and considerations
12 which individual Commissioners have put into the matter in
13 forming their own views.

14 As is not infrequently the case with a long list
15 of individual positions which Commissioners wanted to go over
16 one by one rather than deal with en bloc, we moved through
17 this list simply seeing where the majority of votes lay.

18 As I say, but that does not imply, as I say, that
19 the merits of the arguments as laid out in the DAMANS report
20 in subsequent documents by the staff were not considered
e-3 21 by Commissioners.

b-4 22 It seems to me the proposition that the head or
23 heads -- "head" speaking collegially, or "heads" as to
24 individual Commissioners -- have no power or influence with
Ace-Federal Reporters, Inc. 25 regard to the grades of senior officers of the agencies, that

1 is likely to be a difficult one to sustain. I would not have
2 expected Commissioners generally to have come -- to have held
3 that view. My perception is, most of the Commissioners, all
4 of the Commissioners read the language in the statutes which
5 establishes -- which say things like the personnel actions
6 of the agency, that the power to make those flows from the
7 collegial action of the body to be a pretty correct
8 establishment of authority.

9
10 However, it seems to me it is also possible that
11 there is a body of regulation adopted by the Commission which
12 fails perhaps to deal explicitly with Commission actions, or
13 even in fact erects a structure which you believe you find
14 there, which would say that the Commission has violated its
15 own rules.

16 But I think whether we would agree with you on
17 the legal proposition or not depends upon some study and
18 advice by the General Counsel. I think the question of
19 whether that argument stands or falls can be set apart from
20 whether the Commission decision in any case was a wise and
21 correct one, all things taken into account, or whether it
22 failed to consider some of the things that you present here
23 and that you believe make a perfectly valid case for the
24 upgrading which was recommended by Mr. Ryan and so on.

25 MR. SCHWARTZ: May I say something? 280 208

CHAIRMAN HENDRIE: Of course.

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1 MR. SCHWARTZ: You indicated that perhaps there
2 were other documents and other views prepared by each of the
3 individual Commissioners?

4 CHAIRMAN HENDRIE: No, that is not quite what I
5 said. What I pointed out to you was that a few lines of
6 discussion in a collegial meeting, which lead to a division
7 of the Commission and a finding where the majority vote lies
8 on one of the positions, does not represent the totality of
9 the study which individual Commissioners have given to that
10 matter, is what I have said.

11 Now I don't know what other Commissioners'
12 practice is, but I must say I find for myself that it is
13 impossible for me to prepare documents when I study a paper,
14 this kind of Action Paper, or anyone of the others that
15 compose the daily 12 inches through which I work, so that in
16 fact in my files there is no private, to-himself, memorandum
17 of Joe Hendrie's that says, "well, I studied the DAMANS audit
18 on the Collins and Schwartz, and I think that this argument
19 is good, and this argument is bad, and I come out as follows,"
20 I just don't have anything like that.

21 The lists which are referred to in the transcripts
22 are -- were the 97(A) paper, as I recall them -- at least that
23 is the list I was working from. And in fact, the one which--
24 the marked up one which is attached to my February 13th
25 memorandum to the Secretary is simply a straight-off copy of

1 the one I worked down during the Commission meeting, in
2 saying "where does the vote lie on this one? on this one?" and
3 so on.

4 So you already have in that memorandum my mark.
5 I think John had a list on which he made some notes, and I
6 assume that is forthcoming in response to the request, and
7 others may have had --

8 COMMISSIONER KENNEDY: I can't recall, but did I
9 not write a short memorandum covering the entire list? I
10 simply don't recall.

11 MR. SCHWARTZ: We have not received it, sir.

12 CHAIRMAN HENDRIE: I thought you did, as a matter
13 of fact.

14 COMMISSIONER KENNEDY: If so, that must be what
15 is referred to here.

16 MR. SCHWARTZ: It was referred to in the
17 transcript.

18 CHAIRMAN HENDRIE: I thought you went with the
19 EDO recommendations?

20 COMMISSIONER KENNEDY: I can't recall.

21 MR. COLLINS: We know from the transcript that
22 the Chairman did have --

23 COMMISSIONER KENNEDY: You haven't received --

24 MR. COLLINS: We didn't receive Mr. Kennedy's
25 vote. He was absent from the meeting, because you asked the

1 other Commissioners whether or not you could count his vote,
2 even though he is not here, and they all say "yes."

3 CHAIRMAN HENDRIE: I will look forward to the
4 reporter's version of those two conversations --

5 (Laughter.)

6 CHAIRMAN HENDRIE: -- carried on simultaneously,
7 with some interest in how the reporter might manage to get
8 them down. It seems to me that, because of the divergence
9 of views on individual cases, that the Commission had some
10 difficulty in finally arriving at collegial decisions on the
11 matter.

12 And I can recall circulating and talking to
13 Commissioners to see what the opportunity might be for
14 action, at some length, as a matter of fact.

15 So I guess I would -- had in advance an idea
16 where people's views lay with regard to the positions,
17 particularly the positions in the 97(A) paper.

18 COMMISSIONER AHEARNE: Joe, you are still working
19 on questions?

20 CHAIRMAN HENDRIE: I sure am.

21 Vic has one.

22 COMMISSIONER AHEARNE: I have two questions.

23 First, as far as the flow of logic is concerned,
24 could you go through again why, if we accept the logic that
25 you raise, we should not therefore refer all of the decisions

1 back to the original EDO's decisions?

2 MR. SCHWARTZ: I did not mean to imply that you
3 should not do that. I think the implication in the evidence
4 we presented is that you might want to look at that. YOU
5 might want to make an investigation of whether you should
6 or you shouldn't.

7 COMMISSICNER AHEARNE: I see.

8 You were then raising that it appears to you that
9 on the legal grounds, the EDO is the final authority on
10 those issues?

11 MR. SCHWARTZ: That's correct.

12 MR. COLLINS: That's correct.

13 COMMISSIONER AHEARNE: And if the legal review
14 bears that out, then his decision would be final on all of
15 those, not just yours?

16 MR. SCHWARTZ: That's correct, sir.

17 COMMISSIONER AHEARNE: The second question, I don't
18 recall --

19 CHAIRMAN HENDRIE: I must say, if that turns out
20 to be the case, I will feel some considerable chagrin. The
21 matter, as I recall it, went on for some time, and
22 discussions around the floor and in meetings, and I would
23 have been passing grateful to have been relieved of the
24 need to bring the Commission to a decision.

25 MR. SCHWARTZ: May I just expand on my answer to

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1 you? There may be one thing that may be different. And
2 that is, that Mr. Ryan initiated the event in asking that
3 our positions be evaluated as it is in the manual chapter.
4 I don't have any knowledge about the other positions as to
5 whether those positions were requested to be evaluated. So
6 that could be a slightly different story.

7 COMMISSIONER AHEARNE: I see.

8 The second question, I don't recall -- perhaps you
9 did -- but did either of you ask me for an explanation of
10 my position?

11 MR. SCHWARTZ: No, sir.

12 COMMISSIONER AHEARNE: Perhaps I might then review
13 it for you, because it has -- it's obvious -- the list that
14 was referred to is my list, that was -- we were working
15 through.

16 And since you had pointed out in your petition
17 some of your background, I thought it might be useful to
18 reiterate some of my background.

19 Before I came here, I spent two years as the
20 principal Deputy in the Office of Manpower in the Defense
21 Department. And one of the areas of responsibility was the
22 Civilian Manpower System for the Department of Defense,
23 which was fairly substantial.

24 I also spent about a year on a commission which
25 was called the Rockefeller Commission as the Department of

1 Defense's representative, and worked probably about six an-
2 months of effort on that.

3 The Rockefeller Commission's recommendations have
4 ended up in many ways becoming the SES system, in a lot of
5 the President's proposals for reform in the Civil Service
6 System.

7 So that in coming here, I did not come with an
8 absence of fairly detailed background.

9 In addition, one of the studies that we did when
10 I was there for me was the use of factor analysis in the
11 ability to use factor analysis for position manpower classifi-
12 cation system.

13 (Commissioner Bradford returns to the room.)

14 COMMISSIONER AHEARNE: And DAMANS factor analysis
15 approach to grading positions.

16 After I came here, I spent the first few months
17 trying to understand the operations of the Commission and
18 meeting with a number of people.

19 I did spend sometime with Mr. Ryan, and I remember
20 with Mr. Collins. I don't recall Mr. Schwartz whether I
21 spent time with you.

22 I also went back over the thrust of why there was
23 a review going on. At least my interpretation, as I think is
24 clear in my memo that I wrote, was there was considerable
25

1 interest on some elements of the Congress in having a review
2 done of the NRC in the number of supergrades we had in,
3 sort of my view, the hard look that at least I was familiar
4 with trying to be taken at the Defense Department.

5 As a result of that, it appeared to me, after
6 having gone through the DAMANS review, that I ought to spend
7 a little more time with the DAMANS people, and I spent many
8 hours, just as you did, but in the other way. I was asking
9 them -- I read their reports and then spent several hours
10 with them trying to understand as best I could both the
11 approach they used, the rationale they used, and the
12 balancing across the NRC, the perspective they took.

13 My net judgment after that kind of a review was
14 that, for whatever reasons, the Office of State Programs
15 did not have the major responsibilities laid on it in the
16 Commission that some of the other offices did. And as a
17 result, that -- and again, I was not familiar with the
18 background of the AEC/NRC, but it did not seem to have the
19 kind of thrust and high interest and high responsibility area
20 that some of the other Commission offices did.

21 Now there is some irony to this, clearly, because
22 as a result of the recent accident at Harrisburg, obviously
23 all of that is going to change. The world will be substan-
24 tially different. But that is separate from the question of
25 what were the functions of the office.

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It was based upon that sort of balancing judgment that I made my recommendations. And I thought at least you ought to have the opportunity to hear that.

MR. SCHWARTZ: Commissioner Ahearne, I appreciate that. Thank you very much.

CHAIRMAN HENDRIE: Peter?

COMMISSIONER BRADFORD: No.

CHAIRMAN HENDRIE: The Commissioners don't seem to have anymore questions.

I take it your argument is made here, as you wish to make it. I think the Commission would like to have counsel's views on the procedural question, and then we will --

COMMISSIONER AHEARNE: I believe we owe these two gentlemen a response no later than the 30th, which was their request.

COMMISSIONER KENNEDY: We ought to be able to do better than the 30th, since it is only the 25th.

CHAIRMAN HENDRIE: We will see what we can do. We have some other opportunities during the week. We have a meeting scheduled for the 28th on personnel matters. Perhaps we can deal with it there.

MR. SCHWARTZ: Mr. Chairman, if there is anytime that you think you would like more information or any further discussion with Mr. Collins and myself, we are on call.

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CHAIRMAN HENDRIE: Okay, we appreciate that very much.

MR. SCHWARTZ: Thank you very much.

MR. COLLINS: Thank you, sir.

(Whereupon, at 10:45 a.m., the Commission meeting was adjourned.)

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