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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION



In the Matter of

Radiation Technology, Inc.
Lake Denmark Road
Rockaway, New Jersey 07866

By-product Material License
No. 29-13613-02

NRC STAFF'S ANSWER IN OPPOSITION TO
LICENSEE'S PETITION FOR REVIEW OF ALAB-567

On November 2, 1979, Radiation Technology, Inc. (Licensee) petitioned the Commission for review of the October 16, 1979 decision of the Atomic Safety and Licensing Appeal Board in this civil penalty proceeding.^{1/}

This proceeding arose out of the March 4, 1977 Order of the Director, Office of Inspection and Enforcement, imposing civil penalties in the amount of \$4,800.00 against the Licensee for nine items of noncompliance disclosed during an inspection conducted on October 27 and November 1, 1976. On April 1, 1977 the Licensee invoked its right to a hearing on the Order. A hearing was held before the Administrative Law Judge. He subsequently affirmed the civil penalties for seven of the items of noncompliance and remitted the civil penalties for two of the items.^{2/} The Licensee appealed the decision of the Administrative Law Judge as to the seven items found to merit civil penalties. The Staff appealed the decision on the other two items. In ALAB-567 the Appeal Board reversed the Administrative Law Judge's decision as to one of the items which the Staff had appealed and affirmed the remainder of the decision. The end result of the Appeal Board's action was a civil penalty totaling \$4,050.00.

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1/ ALAB-567, 9 NRC ____ (October 16, 1979), hereinafter ALAB-567.

2/ Radiation Technology, Inc., ALJ-78-4, 8 NRC 655 (1978).

II

The Commission's regulations provide for discretionary review of decisions of the Appeal Board. However, as noted in the Statement of Considerations for 10 CFR 2.786, ^{3/} this limited review is constrained by the Commission's regulations.^{4/}

The precise bases for the Licensee's contention that Commission review should be exercised and that ALAB-567 is erroneous are not entirely clear. Here the Licensee raises once again factual and legal arguments concerning the specific items of noncompliance which were briefed and analyzed extensively at both levels of the proceeding below. In addition, the Licensee raises a series of "due process" arguments concerning such matters as the right of the NRC Staff to appeal the Administrative Law Judge's decision, the absence, during the hearing of the personal presence of the Director, Office of Inspection and Enforcement, and

^{3/} 42 Fed. Reg. 22128 (May 2, 1977).

^{4/} In pertinent part 10 CFR Part 2 provides as follows:

"The grant or denial of a petition for review is within the discretion of the Commission, except that:

(i) A petition for review of matters of law or policy will not ordinarily be granted unless it appears the case involves an important matter that could significantly affect the environment, the public health and safety, or the common defense and security...involves an important procedural issue or otherwise raises important questions of public policy:

(ii) A petition for review of matters of fact will not be granted unless it appears that the Atomic Safety and Licensing Appeal Board has resolved a factual issue necessary for decision in a clearly erroneous manner contrary to the resolution of that same issue by the Atomic Safety and Licensing Board." Section 2.786(b)(4) (emphasis added).

the basic right of the Commission to conduct the inspection at all.^{5/} These due process arguments have also been briefed and analyzed in the proceeding below and were addressed by the Appeal Board in its decision.

III

Except in one area, both the Administrative Law Judge and the Appeal Board resolved the facts, law and policy at issue in this proceeding adverse to the Licensee. In the one area where the Appeal Board reversed the Administrative Law Judge, it did so because the Administrative Law Judge clearly misconstrued both the regulatory requirements and the associated evidence.^{6/} The Appeal Board's rationale for this reversal is based squarely on the evidence and is well reasoned. It is not deserving of Commission review.

The Licensee believes that both the Administrative Law Judge and the Appeal Board are wrong. However, more than that is necessary as a basis for Commission review. The arguments of the Licensee in respect to the particular items of noncompliance, do not meet the standards of section 2.786(b)(4) of the Commission's requirements. They do not raise important questions of law or public policy or matters which could significantly affect the environment or the

^{5/} The Licensee also argues that the Appeal Board demonstrated "incredible prejudice" in its opinion. ALAB-567 at 1. This conclusion should be dismissed outright as its basis is merely that the Appeal Board reached a different conclusion as to the facts in the record than the Licensee would have desired. The Licensee further alleges that due process was violated because the Appeal Board did not grant its request for oral argument in New Jersey. ALAB-567 at 10. Simply stated, there is no requirement for conducting oral argument nor is there a requirement for the reviewing panel to travel to the locale of the appellant. Cf. 10 CFR Part 2, Appendix A, IX (e).

^{6/} ALAB-567 at 33-37.

public health and safety. Factual disputes were not resolved by the Appeal Board in a clearly erroneous manner contrary to the Administrative Law Judge's decision.

The Licensee's "due process" claims pertaining to the lack of the personal presence of the Director and the right of the Staff to appeal decisions may result from a lack of understanding of the regulatory structure of this agency. For example, as the Appeal Board indicated in its decision, the Director's authority in a civil penalty case is terminated upon the request for a hearing.^{7/} In fact, 10 CFR 2.203 of the Commission's regulations specifically states that once a hearing has been noticed the Staff cannot enter into a stipulation or settlement agreement without the approval of the presiding officer. With respect to the Licensee's argument that the Staff may not appeal, the Appeal Board noted that 10 CFR 2.762(a) expressly provides for Staff appeals.^{8/} Neither of these "due process" arguments meet the standards of 10 CFR 2.786(b)(4) nor raise matters worthy of Commission review.

The final "due process" question concerns the NRC's authority for conducting inspections without first obtaining a warrant. This matter is the sole issue in this proceeding which might arguably merit Commission review had it not been previously decided in such a manifestly correct fashion. In Union Electric Company,^{9/} a case involving construction of nuclear power plants, the Appeal

^{7/} ALAB-567 at 6.

^{8/} ALAB-567 at 28.

^{9/} Union Electric Company (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126, 139-142 (1979).

Board held that NRC inspections fit well within the warrantless search exceptions carved out by the Supreme Court in Marshall v. Barlow's for "pervasively regulated industries".^{10/} In the instant case, the Appeal Board correctly held that the Staff was authorized to conduct the inspections as users of radioactive materials have "no 'expectation of privacy'" in activities involving such material. The Staff submits that in view of the decision of the Supreme Court in the Barlow's case and the interests of health and safety which are the paramount concern of this agency, the authority of NRC to conduct an inspection of a licensed activity involving radioactive material without a warrant should not be reopened for argument.

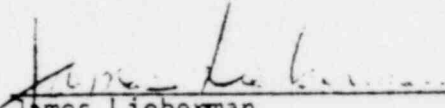
CONCLUSION

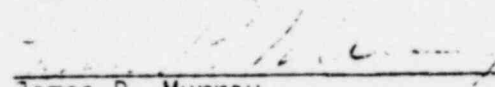
We submit that the issues presented in this case do not involve important questions of fact, law or policy warranting the extraordinary Commission review sought by the Licensee. Beyond that, even if it were to be conceded for purposes of argument, that the warrantless inspection issue rises to such a standard, the Appeal Board's cogent, well reasoned decision makes it clear that this issue has been correctly decided. For these reasons the NRC Staff

^{10/} 436 U.S. 307, 313 (1978).

submits that the Licensee's petition for Commission review of ALAB-567 should be denied.

Respectfully submitted,


James Lieberman
Counsel for NRC Staff


James P. Murray
Counsel for NRC Staff

Dated at Bethesda, Maryland
u. s 19th day of November, 1979.

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