UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING APPEAL PANEL
WASHINGTON, D.C. 20555

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March 26, 1980

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

FROM: Alan S. Rosenthal, Chairman
Atomic Safety and Licensing
Appeal Panel

SUBJECT: "A STUDY OF THE SEPARATION OF FUNCTIONS AND EX PARTE RULES IN NUCLEAR REGULATORY COMMISSION ADJUDICATIONS FOR DOMESTIC LICENSING"

By SECY-80-130 (March 11, 1980), the General Counsel has submitted to the Commission the results of his study of the current NRC rules on the subject of private, not-on-the-record, communications between agency adjudicators and other persons within or outside the agency. The study deals with the two aspects of this subject: (1) the proscription against private communications between adjudicators and persons outside the agency on any matter in issue in an adjudicatory proceeding; and (2) the like proscription against intra-agency communications. These bars are found in the Commission's ex parte and separation-of-functions rules (10 CFR 2.780, 2.719). Although the study treats both parts of the subject exhaustively, only changes regarding the separation-of-functions aspect (i.e., intra-agency communications) are proposed for consideration.

By reason of the absence of suggestions for the possible amendment of the existing ban against ex parte communication with outsiders, I infer that the study finds that ban to be satisfactory. My own experience over the past seven years leads me to agree with this assessment. To my knowledge, the ban against private outside communication has not hindered the Appeal Panel members' ability to carry out properly their adjudicatory functions. To the contrary, I believe its effect has been salutary.

As to the separation-of-functions rule (the subject of my remaining comments), the principal conclusion reached in the study is that the NRC places greater restrictions on communications between adjudicators and agency personnel than required by law. SECY-80-130, p. 6. The study finds that there is room, legally, for relaxing somewhat this ban on intra-agency communications between adjudicators and staff in contested cases. Id. at pp. 6-7. (The rule has only limited application in uncontested cases; and that aspect of the rule is not the subject of any proposal for change.)

By way of possible amendments to the separation-of-functions rule, the study offers five options (A through E) for Commission consideration. Study, pp. 154-83. The first two options -- A, for "initial licensing" cases, and B, for other cases, -- would distinguish among the various staff members such as staff advocates (essentially NRR and ELD members), witnesses, investigators, reviewers and supervisors; and would allow adjudicators to consult with some but not with others. Option C would set up a separated staff. Members of that staff could not be consulted by adjudicators. Other agency personnel (not on the separated staff) would be available for consultation so long as they did not communicate with persons outside the agency with respect to the matters under adjudication. Option D would change the role of the staff in adjudications to that of a mere fact collector. In that role, the staff would not assume an advocacy function and would not take a position in support or in opposition to the license application. The final option (E) involves seeking new legislation which would relax one or more of the existing restrictions against communication by adjudicators with others either within or without the agency.

I have two principal concerns regarding these various proposals. First, it is not clear to me that the study makes a good, let alone compelling, case for liberalization of the rules against private communications by adjudicators with others inside the agency. Indeed, the study itself expresses uncertainty as to the need for change. Second, the various proposals for allowing greater private communications between adjudicators and others do not adequately focus upon the element of fairness, in fact and in appearance. These concerns will be discussed in order.

1. Although the study concludes that this agency's existing separation-of-functions rule goes beyond the requirements of law in prohibiting consultation between agency decisionmakers and

staff personnel, I do not understand its author to conclude that the rule has proven detrimental to the agency's discharge of its functions. In this regard, the study expressly states that "it is not proper to suggest that the plethora of communications problems in the agency is the result of legal prohibitions imposed by these rules" (id. at p. 6). Further, alluding to the seven specific communications problems specified by the Kemeny Commission's Chief Counsel in his support of that Commission's report, the study states that "it is unclear that any of them were actually caused by these rules" (ibid.).

Insofar as the appeal boards are concerned, I am totally persuaded that the ban against off-the-record communications with the staff has not served as an impediment to the proper discharge of their duties. Any need for discussion of the merits of any proceeding both can be and has been satisfied through the mechanisms of written submissions and oral arguments. */

2. As the study points out, the ban against intra-agency communication on matters under adjudication was adopted, as a matter of policy, in the interest of maintaining fairness in the licensing process. Id. at pp. 35-36, 38, 41, 47, 49. This is an enormously important objective and, in my judgment, any relaxation of the ban would be fraught with danger.

First, there are practical difficulties in insuring that any private discussion is kept within permissible bounds. No matter how the separation-of-functions rule might be altered, the General Counsel's study correctly concludes (pp. 136, 152) that any discussion between adjudicators and others cannot involve new facts or arguments not contained in the public record without giving rise to due process problems. While it may be theoretically possible to limit any discussion to matters already on the record, it is not always easy to do so in practice. This is especially so in cases involving complex facts and novel issues.

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*/ In this connection, it must be borne in mind that, whether or not there are off-the-record private discussions between an adjudicator and a staff member, adjudicators must base their decisions upon the disclosures of record; i.e., they may not rely upon anything which is told to them in a private conversation (and thus cannot be confronted by other parties to the proceeding). I do not believe that the study sufficiently emphasizes this consideration.

Second, even assuming that the private consultation between the adjudicator and a staff member were appropriately limited in content, the mere fact that a private, off-the-record, discussion was held with the representatives of one party might incubate (especially if it first became known after the event) the suspicion of improper conduct. In any case, the appearance of unfairness which such one-sided discussion would create well might lead to even greater public distrust of NRC's licensing procedures than now exists. In my view, these considerations override whatever benefits might be derived from permitting private consultations between adjudicators and staff members.

I therefore recommend against alteration of the separation-of-functions rule to allow such consultations as proposed in options A and B. For the same reasons, I would not favor a rule change which would allow the Commission to discuss privately with adjudicatory board members any substantive issue involved in a still on-going licensing proceeding. I am equally opposed to such private discussions between Licensing Board Panel and Appeal Panel members. I do not, however, see any cause to preclude consultation among adjudicators on the same level.

Should the Commission perceive a need for technical and other advice concerning NRC licensing proceedings which cannot be met under the existing organizational structure, it might wish to establish a small group to perform this function (somewhat along the line of the separated staff system discussed in option C). This group, the members of which would be publicly identified, would not be permitted to communicate with the staff or the public on matters under adjudication and would be available only to the Commission for advice and consultation.

Neither of the remaining options (D and E) is sufficiently detailed in the study to permit firm conclusions regarding its acceptability. As a general observation, however, I share Professor Davis' skepticism with respect to option D, which is referred to at pp. 179-80 of the study. In common with him, I have serious doubts that the staff can truly be expected to adhere to a purely fact-finding, non-advocacy role, given the extensive review functions it now performs on applications for licenses to construct and operate nuclear power reactors.

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