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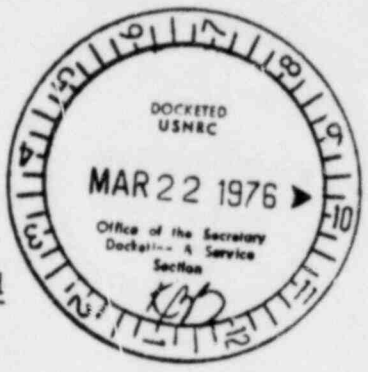

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
THE TOLEDO EDISON COMPANY and	)	Docket Nos. 50-346A
THE CLEVELAND ELECTRIC ILLUMINATING	)	50-500A
COMPANY	)	50-501A
(Davis-Besse Nuclear Power Station,	)	
Unit 1)	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING	)	Docket Nos. 50-440A
COMPANY, ET AL.	)	50-441A
(Perry Nuclear Power Plant,	)	
Units 1 and 2)	)	

ORDER CERTIFYING RULING IN
SPECIAL SECTION 2.713 PROCEEDING

By Order of Jaunary 19, 1976, this Board entered an order of suspension and disqualification in these proceedings of the firm of Squire, Sanders & Dempsey (the "Firm"), counsel for Applicant Cleveland Electric Illuminating Company. This order was issued pursuant to a motion for disqualification filed on November 20, 1975 by the City of Cleveland (City). Board member Smith dissented on the merits to this action of the Board. As required by the provisions of Rule 2.713, the order of suspension was stayed pending opportunity by the affected firm to be heard by another presiding officer.

By Order of February 24, 1976, a Special Atomic Safety and Licensing Board found no evidence of unethical conduct by the

Firm, dismissed the charges preferred by this Board and vacated the order suspending counsel. The Special Board indicated that the City should be referred to the Bar Disciplinary Authorities in the State of Ohio in the event it wished to further plead and prove its claim of alleged unethical conduct. See Board Ruling In Special §2.713 Proceeding, p. 16.

Special Board member Luton filed a separate opinion stating:

> . . . that Section 2.713(c)(2) is not intended to embrace attorney conduct where Commission action with respect to that conduct would not reasonably further the agency's mission.

Separate Opinion at 10. The majority of the Special Board likewise concluded that:

> If such an analysis and conclusion [appearance of impropriety] had been rendered by a jurisdictionally-competent bar association grievance committee, we would have no procedural quarrel with it. However, we seriously question a licensing board's jurisdiction to adjudicate 'appearance of impropriety' cases.

Special Board Order at 7.

It is apparent that an important and novel jurisdictional question has been raised. Fairly construed, the two opinions of the Special Board lead to a conclusion that the Commission may lack jurisdiction to suspend attorneys for unethical actions occurring without the forum of Commission proceedings notwithstanding any impact these occurrences may have on representation

before the Commission.* This jurisdictional basis for the decision of the Special Board, together with the holding that no evidence supports the finding of this Board of unethical conduct, present significant policy issues of first impression in this Commission. Because of the importance of attorney representation to the conduct of the entire proceeding (now well into the hearing stage), we indicated at the time of oral argument that certification would be considered. Both the Firm and the City indicated to the Board that in the event of an adverse determination, the losing party desired certification. See Memorandum of Squire, Sanders & Dempsey Opposing Motion for Order of March 10, 1976, p. 2.

EVALUATION OF §2.730(f)
STANDARDS TO THE DISQUALIFICATION DECISION

We recently have had occasion to consider the Memorandum and Order of the Appeal Board of February 26, 1976 in which Applicant's Motion for a direct certification under 10 C.F.R. 2.718(i) was denied summarily. The Appeal Board eschewed the role

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* To be sure, the majority opinion emphasizes that they are not holding that a conflict of interest case may never justify invocation of a Section 2.713 remedy. Nonetheless, there is a significant difference between the criteria under which the separate board majority envisions invocation of the remedy and the standard applied by the initial Board. Although there was a dissent on the merits, no member of the initial Board questioned the Commission's jurisdiction to require suspension in the event a conflict situation as alleged to exist by the City is established.

of day-to-day monitor and indicated that neither an incorrect ruling nor potential prejudice resulting from that ruling require the intervention of the Appeal Board except in unusual circumstances. Neither does the mere possibility of reversal on appeal justify constant supervision by the Appeal Board over Licensing Board rulings. Further, in Commonwealth Edison Co. (Zion Station, Units 1 and 2), 6 AEC 258, the Appeal Board set forth the criteria that an issue worthy of certification involve an important or overriding issue of law or policy. With respect to the Zion opinion, we note the Appeal Board's observation of useful precedent arising out of federal judicial proceedings pursuant to 28 U.S.C. Section 1292(b). Accordingly, in deciding whether to certify the matter of attorney disqualification, we have been mindful of the standards enunciated by the Appeal Board and, in addition, have measured the applicability of Commission standards against attorney disqualification appeals brought pursuant to Section 1292(b).

Turning first to §1292(b) considerations, we find that notwithstanding earlier disagreements among the various circuits relating to the extent to which interlocutory appeal to review a disqualification order is appropriate, there is increasing agreement that because disqualification involves separable and final adjudication of rights independent of the cause of action itself, interlocutory appeal is proper. The principles underlying this rationale were articulated in Cohen v. Beneficial Industrial Loan

Corp., 337 U.S. 541, 546 (1949). The Cohen rule has been adopted with respect to disqualification orders by the Second Circuit*, the Third Circuit**, the Tenth Circuit*** and the Fifth Circuit.**** Each of these opinions recognizes the "finality" of the disqualification order as a collateral determination independent from the actual subject matter of the proceedings. These cases also concentrate upon the practical considerations singled out by the Court in Cohen relating to a certain small class of decisions which are of sufficient importance to require immediate appellate consideration. 337 U.S. at 546-547.

In the instant proceeding, we are confronted with an issue of law and policy important to Commission policy and not dependent upon the outcome of the central proceedings before final resolution. At the same time, resolution of the disqualification question may prevent relitigation of the issues in controversy for factors unrelated to the Board's consideration of the issues themselves. The ruling of the Special Board has called into question

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* Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2nd Cir. 1974).

** Green v. Singer Co., 509 F.2d 750 (3rd Cir. 1971).

*** Fullmer v. Harper, 517 F.2d 20 (10th Cir. 1975).

**** United States v. Garcia, 517 F.2d 272 (5th Cir. 1975).

the jurisdiction of this Commission to entertain certain disqualification motions and involves the intended scope of Rule 2.713. The jurisdictional question alone suggests a greater need for immediate appellate review.

ULTIMATE DISQUALIFICATION AUTHORITY

Assuming that the conduct in question is within the Commission's jurisdiction, the question then arises as to how disqualification pursuant to that jurisdiction may be put into effect. Two boards must become involved before any disciplinary order can become final. However, Rule 2.713 is not entirely clear with respect to the status of an order of suspension in the event the Special Board finds that charges preferred under 2.713(c) should not be sustained. The Special Board construed its authority to include the dismissal of the charges and the vacation of the suspension and entered an order to that effect. Special Board Ruling at 18. By Motion of March 1, 1976, the City of Cleveland moved for enforcement by this Board of the order of suspension, construing the role of the Special Board as merely advisory. The Firm and the Staff contest the City's reading of the rule. Thus, we are called upon to decide yet another issue of first impression; namely, the extent of our authority to order a Rule 2.713 suspension notwithstanding an adverse recommendation from the Special Board.

The Rule itself offers no guidance nor do we find any other indication by the Commission as to what the intended effect of the rule is to be. On balance, we conclude that final authority must vest with the initial Board, for it is that board which is charged with the ongoing conduct of the proceedings. To hold that final authority vested in the Special Board would undermine the ability of the initial Board to maintain control and to protect the integrity of its proceedings.*

Although we conclude that ultimate authority with respect to enforcement of a suspension order must vest with the Board before which the hearing is proceeding, there is a sufficient lack of clarity and the issue is of such importance that we believe this question must be certified.

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* Obviously, the initial Board would have to give great deference to the decision of the Special Board prior to taking any action on an order of suspension in order to give any rational effect to Rule 2.713 as presently written. If the initial Board were free to disregard the findings of the Special Board, there would be little purpose in the requirement that a separate hearing on the charges be held. In those instances in which the initial Board does not accept the conclusions of the Special Board in a disqualification contest, it seems almost inevitable that the issue be certified for immediate resolution. The need for certification would be lessened where the two boards are in agreement, but, as discussed earlier in this memorandum, the collateral nature and finality of disqualification decisions may place them in a special class of rulings deserving certification in almost every instance.

PROCEDURES BEFORE
THE SPECIAL BOARD

Having decided that the initial Board should be the ultimate arbiter of disqualification, we then must decide the motion for the City of Cleveland that we enter an order of suspension notwithstanding the ruling of the Special Board. During the course of the proceedings before the Special Board, additional first impression questions as to the nature of that hearing and the scope of evidence to be received were raised into question. Basically, there was disagreement between the Special Board and the parties with respect to whether additional evidence relating to the charges preferred by the initial Board should or could be received. At the hearing before this Board on December 31, the City of Cleveland took the position that it would be entitled to introduce new evidence before the Special Board in the event the initial Board failed to prefer charges.* The Firm, at the hearing before the Special Board, not only attempted to present evidence but made a proffer of evidence to preserve its objection to the refusal of the Special Board to admit that evidence.

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* It should be noted, however, that this asserted right was grounded upon a contention that the initial Board would be in error in failing to consider certain of the Firm's documents which had been withheld from production to the City under claim of privilege. Parenthetically we note that the initial Board reviewed all privileged documents alleged to be connected with the Firm's representation of CEI and determined that they were in fact of a privileged nature and, further, that the content of those documents offered no evidence supporting the City's motion for disqualification. Tr. p.

We are of the opinion that the decision of the Special Board not to permit the parties to introduce additional evidence was correct. Were it otherwise, the initial Board would be forced to prefer its charges based upon an incomplete record, and in circumstances where the initial Board is not the charging party, there is no logical basis for placing the Board on this posture. Such a procedure would lead to inefficiencies in the administrative process. The parties would have an inducement to hold back evidence until they had an opportunity to examine the decision of the initial Board, and the Special Board would be ruling upon matters not even called to the attention of the Board charged with the proper conduct of the proceedings.

THE DECISION OF THE SPECIAL BOARD

We now examine the question of whether we should vacate our order of suspension in light of the findings and conclusions of the Special Board. Those findings and conclusions not only represent the unanimous opinion of the Special Board that the charges drawn by this Board lack merit (Board member Luton filed a separate opinion setting forth the basis of his reasoning), but we must also consider the articulate dissent of Board member Smith to our initial order. Thus, we begin by considering whether the finding that our order cannot be supported does not require us to vacate that order.

We have already stated our disagreement with the Special Board with regard to at least one primary basis for its order, the

jurisdiction of the Commission to order suspension based upon allegations such as those now before us. The Commission's decision in Northern Indiana Public Service Company, ALAB-204, 7 AEC 835, 838 and Louisiana Power & Light Company, ALAB-121, 6 AEC 319 cited in the March 1 Motion of the City of Cleveland, at least suggest a wider jurisdiction than that contemplated by the Ruling of the Special Board. More importantly, the jurisdictional limitation seems inconsistent with the Commission's Rule 2.713(b) which requires an attorney to conform to the standards of conduct required in the courts of the United States. To the extent that a court would order disqualification upon a finding that the City's allegations were supported by the evidence, the Commission by its own rule should do no less.

A second principal reason for rejecting the findings and conclusions of the Special Board is our disagreement with respect to the standard it employed in deciding whether there had been attorney misconduct. In our opinion, we stated at pages 18, 19:

> We hold as a matter of law that it does not matter whether the information exchanged can be proved or demonstrated to have originated from confidential materials supplied by the client.
>
> The Firm's answer in part turns upon the fact that materials relating to the operation and financing of the City's electrical system which the Firm utilized in rendering advice to CEI were available from public sources as well as through data supplied by the City. This does not resolve the problem. As a practical matter, there is no way of

> separating information supplied by the client from information obtained through other sources. Moreover, it puts the law firm in the untenable position of making a judgment as to what information the client contends would be confidential. There simply is no objective way in which a firm can do this. Thus, public confidence in lawyers generally would be impeded if we would permit the Firm to prevail on its argument that information passed from one client to another was non-confidential in nature. Marketti v. Fitzsimmons, 373 F. Supp. 637 (W.D. Wis. 1974).

The Special Board, however, rejected the notion that no exchange of confidential information need be demonstrated. Special Board Opinion at 12, Footnote 10.

> We are also aware that the nub of the City's complaint is its suspicion that the law firm in question might be giving an "edge" to the City's de facto adversary in this proceeding by transmitting "inside" information to CEI about the City's operations, capabilities or condition, which information may have been obtained from the City in the firm's earlier lawyer-client relationship with the City. However, no such non-public information has been specified and the record discloses no such breaches of confidence, . . . Even if the sanction of prohibition from legal representation of the non-complaining party were authorized by the ABA rules referred to (it is not), it seems that before destroying such valuable representation, on such a potentially damaging charge, the Board should have required hard evidence of injury-in-fact or at least evidence of specific "confidences" that were breached . . . .
>
> It follows that we are in complete disagreement with the earlier majority's view that a licensing board can take such harsh action without such specific evidence and that "as a matter of law . . . it does not matter whether the information exchanged can be proved or demonstrated to have originated from confidential materials supplied by the client." (Majority, slip. op., at 18).

It is not surprising that the two boards came to different conclusions with respect to the establishment of an evidentiary basis upon which to predicate disqualification. The conduct in question was measured against different standards, and the applicability of that standard is basic to the outcome of this decision.

After further reflection, we adhere to our view that there is no realistic way for the challenging party to determine if information exchanged within the Firm is thought to be confidential. Moreover, the requirement of such a test would discourage clients from discussing their affairs with candor and without reservation with their chosen attorney. A rule which requires the client to weigh and evaluate the use or misuse of information he supplies his lawyer, prior to disclosing that information, will discourage efforts to obtain competent advice based on full disclosure of all facts relevant to the issue under consideration. Accordingly, we reject the concept that there need be actual proof of injury or "specific proof of the passing of confidential, nonpublic information from one client to another" (Special Board Opinion at 7) as required by the Special Board.

We believe that use of information obtained from one client, whatever the nature of that information, in support or assistance of another client with adverse interests in and of

itself permits the supplying client to obtain disqualification of the attorney.

A third reason for declining to accept the recommendation of the Special Board is our disagreement that "no evidence of unethical conduct" appears in the record. We rely specifically upon the June 21, 1974 Lansdale to Hauser letter and the accompanying memorandum of Brueckel to Lansdale of May 21, 1974.* All three members of the Special Board accepted the argument that the crucial May 21 memorandum related to municipal law generally and therefore did not represent an instance of cross-fertilization between attorneys loyal to different clients. We cannot agree that this is a correct reading of that memorandum. The subject of the memorandum is a specific agreement between Cleveland and CEI to supply electricity generated by nuclear power plants and the memorandum is directed to satisfying "the understood desire of CEI to have the agreement highlight the Municipal Light and Power Plant and System (MELP) to the maximum possible degree." A reading of the text of the memorandum indicates that its focus is on a specific problem and is not an expository view of municipal law generally. Although short, the memorandum deals particularly

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* We are not persuaded that the "Little Hoover Commission" incident of 1966 does not provide any evidence of the exchange of confidential information, but were this the only support for the City's allegations we might accept the findings of Mr. Smith and the finding of the Special Board.

with the relationship of MELP to the City of Cleveland and not to the general subject of municipally-owned light plants. Paragraph three of the memorandum indicates that the author had given his attention to "the ordinance authorizing electric financing currently being offered for sale" - i.e., the 1972-73 bond issue. We simply do not believe that Mr. Lansdale consulted Mr. Brueckel because of his general knowledge of the relationship of municipalities to their electric system. We can come to no conclusion other than that Mr. Brueckel was consulted because of his familiarity with the Cleveland system and the intricacies thereof. This special knowledge undoubtedly came about in connection with his activities as bond counsel to the City of Cleveland. Further, we believe the nexus to these proceedings to be clear since the memorandum on its face refers to agreements to supply electricity generated by nuclear power plants. The terms and conditions of such agreements, specifically whether they constituted good faith offers of access, are issues of debate in these very proceedings.

Finally, the memorandum may represent only the tip of the iceberg. We do not know what conversations attorneys Lansdale and Brueckel had with respect to the framing of this memorandum or information exchanged orally rather than in written form. We do know that there was some consultation between the two attorneys and we reiterate our finding that the burden cannot be on the challenging party to demonstrate how deep that contact was.

We also have considered the Special Board's ruling that multiple representation is not established in circumstances in which a firm which originally represents two clients makes an election to represent only one of those clients when they are placed in adversary positions. Special Board Opinion at 13. We continue to think that under the circumstances present, either former client can insist upon the withdrawal of the firm in order that the other client not gain a tactical advantage during the course of the litigation.*

We also have given further consideration to the issue of waiver by the City of any right to disqualify based upon its solicitation of representation in connection with the 1972-73 bond issue. With deference to the Special Board, we continue with the view that the Canons do not allow an implicit waiver in connection with future representation. EC-5-16 does not turn upon the legal sophistication of the client, but places the burden of explanation of future consequences and the risk of continued employment solely on the attorney.

QUESTIONS CERTIFIED

For the foregoing reasons, we cannot agree that there was "no evidence" to support our findings, and for that additional reason, we must reject the recommendation of the Special Board.

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* EC-5-16 speaks of both clients' consent to continued employment.

The following questions are certified to the Appeal Board:

(1) Whether the jurisdiction of the NRC under Rule 2.713 extends to situations covering attorney conduct outside of the NRC forum which has an impact on representation within that forum.

(2) Whether the Special Board has the ultimate authority to put into effect or to vacate an order of suspension under Rule 2.713.

(3) Whether a showing of either actual injury or specific exchange of information of a confidential nature is required to enforce a finding of attorney misconduct based upon the exchange of some information supplied by one client of an attorney to another client of that attorney whose interests are adverse to the original client.

(4) Assuming the answer to question two is negative and three is affirmative, whether in the circumstances now before us the order of disqualification may be upheld.*

For the reasons set forth in our Order of January 19, 1976, and taking into account the findings and conclusions of the

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* We recognize that of the four questions, this may be the least deserving of certification. In some respects, it more partakes of a request for a review of a ruling than determination of a question of law or Commission procedure. Nonetheless, it does have the necessary elements of finality and separability from the issues in controversy and we believe that it deserves resolution at this time.

Special Board in its Order of February 24, 1976, we now determine pursuant to Rule 2.713(c) that suspension of the Firm is necessary and required and we so order. This order will be stayed pending decision by the Appeal Board with respect to the questions certified hereunder.

IT IS SO ORDERED.

ATOMIC SAFETY AND LICENSING BOARD

John M. Frysiak, Member

Douglas V. Rigler, Chairman

Dated at Bethesda, Maryland
this 19th day of March 1976.

SEPARATE OPINION

I have not joined in the order certifying the disqualification matter primarily because I continue to disagree with the majority's conclusions regarding the merits of the controversy. My opinion, as set forth in the memorandum dissenting from the Board's initial order of suspension, remains essentially unchanged.

However, with some reservation I concur with the Board's action certifying questions of NRC jurisdiction, special board's authority, applicable standards of attorney conduct, and whether the order of suspension on its merits may be upheld.

Certified question Number 1 relates to the Commission's jurisdiction to promulgate rules controlling attorney conduct. Member Luton of the special board has accurately described our jurisdictional reach (thus the scope of §2.713) as "...not intended to embrace attorney conduct where Commission action with respect to that conduct would not reasonably further the agency's mission." He states also that some conduct reached by §2.713 could occur out of the presence of the board provided it "...bears substantially and directly on a matter which is before that Board."*

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* Mr. Luton's separate opinion, p. 10.

All members of both boards seem to accept this standard and agree that the conduct questioned in this case occurred beyond the perimeter of this forum. Differences arise in evaluating whether the challenged conduct substantially and directly relates to the proceeding before this board. My opinion, as stated earlier, is that there was insufficient proximity between the 1966 incident and this proceeding to invoke NRC jurisdiction. The majority of this board applied the correct standard of jurisdiction (but to incorrect findings of fact and to impermissibly narrow ethical considerations) in relation to the 1972-73 incident of dual representation.

Certified question No. 2 pertains to the authority of the special board to put into effect or to vacate an order of suspension. I continue to agree with the majority of this board that the responsibility and authority rests with the initial board and that this authority is an important part of a hearing board's power to regulate the conduct of proceedings before it.

In addition, placing the responsibility upon the initial board is preferable because it is that board which better perceives the factual background against which the matter should be resolved. Moreover, while the language of §2.713

is confusing in some respects, this confusion does not extend to the question of which board has the final authority to suspend attorneys. A hearing by "another presiding officer" upon charges preferred by the first presiding officer is a condition precedent to ordering the suspension of an attorney by the first presiding officer. While I believe that the special board did not intend its ruling to be more than advisory, there is enough confusion and disagreement among the parties and between the two boards to justify certification of the issue.

Certified question No. 3 relates to injury and to confidential or public information shared with a client. It is an appropriate consideration for certification, but it is too narrow to play the role assigned to it. Certified question No. 4 suggests that the validity of the Board's order of disqualification depends upon the answers to questions 2 and 3. This is not the whole situation.

For example, it is true that Marketti v. Fitzsimmons, 373 F. Supp 637 (W.D. Wisc. 1974) is correctly cited by the majority for the proposition that a conflict of interest or a breach of duty can arise even where the client's affairs are not confidential. But a conflict or breach of duty is

not inevitable in every dual representation of contending parties. Our case cannot be decided upon a theoretical ideal in a void of other factors. Also to be weighed are questions of motive, reasonableness, harm, injury to an innocent party, counterbalancing ethical considerations and the clean hands of the accuser. Finally, we must also determine whether the relief sought by Cleveland is necessary and would be effective in regulating our proceeding. Board action exceeding this purpose and result is beyond the jurisdiction of this Commission.

Ivan W. Smith

Dated at Bethesda, Maryland
this 19th day of March 1976.