

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board
For Special Proceeding

In the Matter of)
)
CONSUMERS POWER COMPANY) Docket Nos. 50-329)
) 50-330)
)
Midland Plant, Units 1 and 2) (Special Proceeding)

MOTION OF MYRON M. CHERRY
TO DISMISS CENSURE CHARGES
FOR LACK OF JURISDICTION

This motion, filed on behalf of Myron M. Cherry, Esquire, seeks dismissal for lack of jurisdiction of all charges preferred against him pursuant to paragraph 13 of the November 4, 1977 Order issued by the Midland Atomic Safety and Licensing Board ("Midland Board"). As discussed below, this Special Board has no authority to conduct any hearing into censure charges. Rather, the Commission's regulations require that any such charges be heard by the Midland Board. Accordingly, those charges must be dismissed.

STATEMENT OF FACTS

A full description of the factual background of the present proceedings is set forth in the Motion

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of Myron M. Cherry to Dismiss Suspension Charges for Lack of Jurisdiction, filed this date. For the purposes of this motion, the following facts are relevant.

On February 16, 1977, at an open session of the Midland Board, a question arose as to the availability of Dr. Richard J. Timm, a proposed witness for the Saginaw Intervenors whose testimony the Midland Board believed would be valuable. Mr. Cherry indicated that the Saginaw Intervenors' financial position was precarious and that, as a result, the participation of Dr. Timm was uncertain. See February 25, 1977 Order. At the hearing, it was agreed that Mr. Cherry would call one of the members of the Midland Board the following Monday to inform the Board whether Dr. Timm would in fact appear.

Accordingly, on Friday, February 18, Mr. Cherry called Dr. Emmeth A. Luebke, a member of the Midland Board, and informed Dr. Luebke that he was not yet certain whether Dr. Timm could appear. When Dr. Luebke asked why the uncertainty continued, Mr. Cherry stated that it was due to the financial problems of the Saginaw Intervenors. The next day, Mr. Cherry wrote a letter

to all parties describing the conversation and requesting financial assistance from the Commission.^{1/} The letter specifically stated that the arguments there set forth were not discussed in this conversation.

On March 7, 1977, the staff wrote a letter to the Board complaining that, in responding to Dr. Luebke's questions, Mr. Cherry went beyond the authorization of the Board at the February 16 hearing. The staff requested the Board to admonish Mr. Cherry for having unauthorized ex parte conversations.

Mr. Cherry responded by letter dated March 10, 1977, in which he characterized the staff's request that he be admonished as an unwarranted waste of time and public funds. Mr. Cherry suggested that the staff could better spend its time analyzing why it had failed to develop an independent Commission position for the hearing, investigate the manipulation of testimony by Consumers Power, or prepare adequately for its own presentation.^{2/} Mr. Cherry also suggested that the

^{1/} After all parties to the proceeding had ample time to respond to Mr. Cherry's letter, the Midland Board issued an order which found that the Commission's policy precluded providing the funds sought by Mr. Cherry's clients. February 25, 1977 Order.

^{2/} The circumstances which gave rise to these suggestions are set forth in the Motion of Myron M. Cherry to Dismiss Suspension Charges for Lack of Jurisdiction, at pages 4-5.

staff's motion was prompted by personal bias and pique directed against him.

In response to Mr. Cherry's letter, the staff filed a motion on March 25, 1977, to censure Mr. Cherry on the ground that his letter "was replete with insulting and abusive comments regarding the personal conduct, ability, and motivation of NRC Staff Counsel." In addition, on May 20, 1977, the staff filed a response to certain motions filed by the Saginaw Intervenors restating these points.

When, after ten weeks, the Midland Board failed to act on the staff's censure motion, on June 6, 1977 the staff filed a Motion for Directed Certification with the Appeal Board. The Appeal Board declined to decide the merits of the censure motion directed against Mr. Cherry. Rather, the Appeal Board stated that

"what is alleged by the staff to be deserving of reprimand is counsel's conduct during the course of the Licensing Board proceedings. In such circumstances, the question whether formal reproof is in order or not is manifestly one for that Board to pass judgment on in the first instance."
June 29, 1977 Order, ¶ 2.

The Appeal Board then cited 10 C.F.R. § 2.718(e) for the proposition that Commission regulations require that licensing boards "[r]egulate the course of the hearing and the conduct of the participants'" June 29, 1977 Order, ¶ 3.

However, the Midland Board never ruled on the staff's request that Mr. Cherry be censured. Instead, the Midland Board stated that "this conduct, as alleged, would violate Ethical Consideration 7-37" and referred the charges to this Special Board. November 4, 1977 Order, ¶¶ 12 and 13.

ARGUMENT

Under the Commission's regulations, a licensing board is required to hear and determine all issues relating to a proposed license and to oversee the course of any hearing. 10 C.F.R. § 2.718; June 29, 1977 Order, ¶3. As a general matter, such a board has no power to delegate its obligations to other bodies. See June 29, 1977 Order, ¶¶ 2 and 3.

The licensing board's authority specifically extends to controlling the conduct of participants in the hearing:

"A presiding officer has the duty to . . . take appropriate action to avoid delay, and to maintain order. He has all powers necessary to those ends, including the power to:

* * *

Regulate the course of the hearing and the conduct of the participants."
10 C.F.R. § 2.718(e).

In fact, in this very proceeding the Appeal Board has already held that the censure motion against Mr. Cherry should be determined in the first instance by the Midland Board. As previously described, in its order of June 29, the Appeal Board specifically declined to decide the merits of the censure motion on the ground that this question "is manifestly one for that Board to pass judgment on in the first instance." June 29, 1977 Order, ¶ 2.

Moreover, the Appeal Board pointed out that

"Commission regulations not only empower the licensing boards to '[r]egulate the course of the hearing and the conduct of the participants' in the interest of insuring a fair, impartial, expeditious and orderly adjudicatory process -- they impose a duty that this be done. 10 C.F.R. ¶ 2.718(e)." June 29, 1977 Order, ¶3.

Instead of deciding the censure motion as directed by the Appeal Board, the Midland Board's order

purports to refer the motion to this Special Board. But the Commission's regulations contemplate the use of a Special Board only with respect to charges which seek suspension of an attorney:

"Before any person is suspended or barred from participation as an attorney in a proceeding, charges shall be preferred by the presiding officer against such person and he shall be afforded an opportunity to be heard thereon before another presiding officer."
10 C.F.R. § 2.713 (emphasis supplied).

See also June 29, 1977 Order, quoted at p. 6 supra. Thus, this Special Board has no jurisdiction to consider censure motions.

In order to rescue its censure motion from dismissal, the staff has made two arguments, neither of which is supportable.

First, the staff claims that the jurisdictional requirement can be circumvented because censure is a "lesser included" penalty and that, despite the language of the Commission's regulations, this Special Board can consider the censure motion because it can consider suspension motions. January 9, 1978 Transcript, at 83-84. This contention is inapposite. If the

Commission intended to authorize special boards to consider issues of censure, it could easily have indicated this intent in 10 C.F.R. § 2.713. Obviously, the Commission did not do so. Whether a special board which has jurisdiction to consider suspension may later determine that something less than suspension is appropriate is an entirely different question than whether it has jurisdiction over censure charges in the first place. The regulations make clear that it does not.^{3/}

Next, the staff would avoid the jurisdictional problem by suggesting that, with respect to the censure motion, the determination of this Board should be advisory only. January 9, 1978 Transcript, at 59. However, it is apparent that a quasi-judicial body which has no jurisdiction to decide a question does not acquire jurisdiction by making its decision advisory. Moreover,

^{3/} What is really at issue here can be analogized to the jurisdiction of federal district courts. Where, for example, a jurisdictional statute such as 28 U.S.C. § 1332 requires that \$10,000 be in controversy, a district court has no authority over actions in which it appears on the face of the complaint that a lesser amount is in controversy. That is not to say, however, that where this jurisdictional test is found to be satisfied a court could not ultimately award judgment of \$2,000, \$200, or \$2 to the prevailing party.

the staff's argument completely ignores the one case which it concedes is controlling. In Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1 and 2), ALAB 332, 3 NRC 785 (1976), the Appeal Board held that the decision by the Special Board was not advisory but determinative:

"[T]he special board must render a decision disposing of the disqualification matter in its entirety and . . . the initial board's function thereafter is limited to the carrying out of the ministerial duty of promptly entering an order giving effect to the special board's decision." 3 NRC at 794.

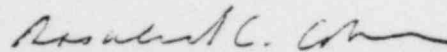
Accordingly, under the Commission's own rules, this Special Board has no jurisdiction to consider the censure motion.^{4/}

^{4/} It is well established that an administrative agency is bound by its rules. See, e.g., Vitarelli v. Seaton, 359 U.S. 535, 539 (1959); Service v. Dulles, 354 U.S. 363, 388 (1957); Smith v. Resor, 406 F.2d 141, 145 (2d Cir. 1969); Hammond v. Lenfest, 398 F.2d 705, 715 (2d Cir. 1968); Pacific Molasses Co. v. Federal Trade Commission, 356 F.2d 386, 389-90 (5th Cir. 1966); Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959), cert. denied, 376 U.S. 915 (1964).

CONCLUSION

For the foregoing reasons, this motion should be granted and the censure charges against Mr. Cherry dismissed for lack of jurisdiction.

Respectfully submitted,



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