

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 STRIKE OR DISMISS CERTAIN CHARGES
FOR LACK OF JURISDICTION

This motion, filed on behalf of Myron M. Cherry, Esquire, seeks to strike, or, in the alternative, to dismiss for lack of jurisdiction, all charges detailed in the NRC Staff's "Statement in Response to the Special Board's Order of December 19, 1977." The charges subject to this motion are entirely unrelated to those preferred by the Midland Atomic Safety and Licensing Board ("Midland Board"), and are simply a gratuitous attempt by the staff to supplement the Midland Board's charges. As discussed below, this special Board is authorized to hear only those charges preferred by the Midland Board and has no jurisdiction to consider additional charges.

STATEMENT OF FACTS

A full description of the background of this proceeding and the events that led up to the preferment of charges by the Midland Board are contained in the motions of Myron M. Cherry, filed this date, to dismiss the suspension and censure charges for lack of jurisdiction. Facts which are of particular relevance to this motion are set forth below.

On November 4, 1977, the Midland Board referred to this Special Board censure charges against Mr. Cherry based upon certain letters he had written. The Board concluded that "[t]his conduct, as alleged, would violate Ethical Consideration 7-37." November 4, 1977 Order, 12.

In the same order, the Midland Board also referred to this Special Board a suspension charge against Mr. Cherry based on a motion by the staff. The Midland Board held that the suspension charge "had to do only with the allegation made by Mr. Cherry about the events that transpired during the ECCS [Atomic Energy Commission] hearing . . . ," which had terminated in 1973. The Board found that "the conduct charged, if true, violates the American Bar Association Code of

Professional Responsibility, Canon 7, and its Ethical Consideration 7-36." November 4, 1977 Order, ¶ 10.

On December 19, 1977, this Board issued an order requiring each party which had previously initiated charges "to submit to the Board a concise statement of the individual charges of professional misconduct which are encompassed in the presiding officer's order of November 4, 1977." December 19, 1977 Order, ¶ 1.

Contrary to the mandate set forth in the December 19 order, the staff responded by filing a Statement containing a fourteen paragraph list of alleged violations of various disciplinary rules by Mr. Cherry. All but one of the fourteen numbered paragraphs asserted misconduct not cited by the Midland Board in its order and not even arguably illustrative of the stated basis for the Midland Board's charges against Mr. Cherry.

ARGUMENT

This Special Board has only the authority to hear matters properly referred to it by a licensing board or other presiding officer. It cannot enlarge the charges of the referring body nor can the charges be expanded by the person who originally initiated the charges.

This conclusion is mandated by 10 C.F.R. § 2.713.

That section provides in relevant part that:

"Before any person is suspended or barred from participating 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." (Emphasis supplied.)

The obvious requirement of this regulation is that the proceedings before the second board must be limited to the charges preferred by the presiding officer of the original board. Because the second board thus has jurisdiction to consider only such matters as the original presiding officer has properly referred to it for hearing, the charges may not be expanded by a "statement" from the party that proposed them.

Such a limitation is not unique to special boards of the Commission, but is common to federal administrative boards. As pointed out in a recent treatise on administrative agencies:

"Bills of particulars may be authorized when they would supply specific details for factual generalities, but the presiding officer may not authorize them if they would interject new issues into the pleadings." Mezones, Stein

& Gruff, 4 Administrative Law § 37.02[7]
at 37-14 (1977).

See In re Fruitvale Canning Co., 50 F.T.C. 177 (1953).

In recognition of this restriction, the Special Board's order of December 19, 1977 specifically requested "a concise statement of the individual charges which are encompassed in the presiding officer's order of November 4, 1977." December 19, 1977 Order, ¶ 1.

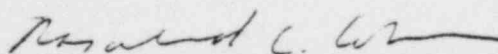
The staff's response to that directive was to assert against Mr. Cherry a laundry list of allegations which had no relation to the Midland Board's order. For example, the staff's Statement charges Mr. Cherry with violating a variety of disciplinary rules by, inter alia, alluding to irrelevant matters, asserting personal opinions, and communicating with adverse witnesses. Rather than detailing the charges referred by the Midland Board, which related solely to EC-36 and EC-37, the staff cited no less than twelve disciplinary rules which Mr. Cherry allegedly violated. The Midland Board's November 4, 1977 Order does not suggest that Mr. Cherry's conduct was in any way in violation of these rules. Nor were the charges which the Board referred to this special body based on the miscellanea which the staff has attempted to introduce.

The Commission regulations leave no doubt that the jurisdiction of this Special Board is limited to the consideration of those specific matters properly referred to it in accordance with 10 C.F.R. § 2.713. Any matter not specified in the November 4, 1977 Order is simply not before this Special Board.

CONCLUSION

As this Special Board is without authority to hear new charges raised by the staff, all charges contained in the NRC Staff's Statement in Response to the Special Board's Order of December 19, 1977, must be stricken or, in the alternative, dismissed for lack of jurisdiction.

Respectfully submitted,



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Dated: February 2, 1978.

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing (1) Statement of Myron M. Cherry with Regard to Filing of Certain Motions, (2) Motion of Myron M. Cherry to Dismiss Suspension Charges for Lack of Jurisdiction, (3) Motion of Myron M. Cherry to Dismiss Censure Charges for Lack of Jurisdiction, and (4) Motion of Myron M. Cherry to Strike or Dismiss Certain Charges for Lack of Jurisdiction, have been served this day on the following by first-class mail or, in the case of Messrs. Deale and Milhollin and Ms. Laurence, by delivery by messenger.

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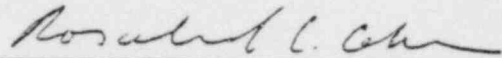
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