

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Dr. John H. Buck
Thomas S. Moore



In the Matter of)
DAIRYLAND POWER COOPERATIVE)
(La Crosse Boiling Water Reactor))

Docket No. 50-409 SC

DECISION

September 24, 1980

(ALAB-614)

This is a show cause proceeding involving the outstanding provisional operating license for the La Crosse nuclear power facility. On August 19, 1980, Frederick M. Olsen, III, then a petitioner for intervention in the proceeding, 1/ moved to disqualify the entire Licensing Board which had been assigned by Commission order 2/ to conduct it. On September 19, 1980, that Board denied the motion and, as required by 10 CFR 2.704(c), referred its action to us for review.

1/ We understand that Mr. Olsen's intervention petition was recently granted and therefore he now is a party to the proceeding.

2/ The order was entered on July 29, 1980. See 45 Fed. Reg. 52290 (August 6, 1980).

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On an examination of the papers filed below for or against the disqualification motion, we conclude (1) that there is no necessity to call for further submissions to us; and (2) that the motion is patently without substance. We therefore affirm summarily the ruling below.

1. The three members of this Licensing Board were also assigned to the separate and distinct proceeding involving the application for an amendment to the La Crosse provisional operating license to enable an expansion of the capacity of the facility's spent fuel pool.^{3/} The sole basis offered for seeking their disqualification here is that they had mishandled that proceeding. In this connection, Mr. Olsen complains principally of their failure to have required the development of a full evidentiary record on certain matters which he maintains were relevant to the disposition of the license amendment application. This asserted failure is said to "have caused a complete and total loss-of-faith in the Board's ability to consider evidence and render a decision that is in the public interest as specified in the Atomic Energy Act of 1954".^{4/}

^{3/} See LBP-80-2, 11 NRC 44 (1980).

^{4/} Motion, p. 3.

2. We need not now pass upon whether there is substance to Mr. Olsen's charges.^{5/} As the Board below correctly observed in denying the motion, the disqualification of a licensing board member may not be obtained on the ground that he or she committed error in the course of the proceeding at bar or some earlier proceeding. Rather, an administrative trier of fact is subject to disqualification only

if he has a direct, personal, substantial pecuniary interest in a result; if he has a "personal bias" against a participant; if he has served in a prosecutive or investigative role with regard to the same facts as are in issue; if he has prejudged factual -- as distinguished from legal or policy -- issues; or if he has engaged in conduct which gives the appearance of personal bias or prejudgment of factual issues.

Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-101, 6 AEC 60, 65 (1973).

Mr. Olsen has not alleged, let alone established, the existence of any facts which might conceivably satisfy any of those tests. In this connection, it is long settled that "[t]o establish that a hearing was biased, something more must be shown than

^{5/} Not being a party to the spent fuel pool proceeding, Mr. Olsen could not appeal from the initial decision rendered therein (LBP-80-2, fn. 3, supra). See 10 CFR 2.762(a). Although the NRC staff did file an exception to that decision, it related to an entirely discrete Licensing Board determination. We have not as yet acted on the exception or completed the review on our own initiative of the decision as a whole.

that the presiding officials decided matters incorrectly; to be wrong is not necessarily to be partisan". Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244, 246 (1974), citing Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 and 2), ALAB-164, 6 AEC 1143 (1973).^{6/}

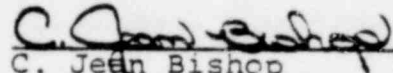
Affirmed.

^{6/} In his response below to the applicant's and staff's oppositions to his disqualification motion, Mr. Olsen stressed that the motion had not asserted that the Licensing Board was biased but, rather, had only questioned the "ability" of its members. He went on to suggest, however, that bias nonetheless might be inferred from the Board's purported lack of expedition in the conduct of both the spent fuel pool proceeding and another (still-pending) proceeding involving the conversion of the La Crosse provisional license to a full-term operating license. (In this regard, Mr. Olsen took note of the Board's statement in an August 5, 1980 order that the instant show-cause proceeding would be completed with dispatch).

Leaving aside the fact that the disqualification motion itself made no such claim, we find wholly insufficient cause for indulging in Mr. Olsen's assumption that the various La Crosse proceedings have been given disparate treatment for the applicant's benefit. There are, of course, many legitimate -- and indeed often compelling -- reasons why one proceeding will move forward more rapidly than another. And, as the Board below noted in its August 5 order, the Commission's July 29 order (see fn. 2, supra) conveys the message that there is to be expeditious disposition of the issues presented in this proceeding.

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Bishop
Secretary to the
Appeal Board

Mr. Moore did not participate in the consideration or
disposition of this matter.