



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD 81 OCT 28 P2:15

Before Administrative Judge Gary L. Willbell
as Special Master

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)
METROPOLITAN EDISON COMPANY)
(Three Mile Island Nuclear)
Station, Unit 1))

Docket No. 50-289
(Restart)
(Reopened Proceeding)
October 27, 1981

MEMORANDUM AND ORDER

On October 16, 1981, at a conference among the parties to this reopened proceeding, the NRC Staff filed a motion seeking reconsideration of an evidentiary requirement which the Special Master had imposed on October 2, 1981. That requirement was that the following item be the subject of an evidentiary presentation by NRC Staff

[t]he Kemeny Commission found that operator training was greatly deficient; that the depth of understanding was far too shallow. It also found that the branch of NRC that monitored operator training was "weak and understaffed," and that NRC limited itself to "giving routine examinations". It concluded that no quantity of "fixes" would cure the basic problem, which it found to be the attitude of the people who were involved. Because the cheating incident occurred after the Staff had responded to the Kemeny Commission and promised to improve, what does the possibility of laxity in the Staff's procedures indicate about the Staff's attitude? Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289, unpublished order at 8 (October 8, 1981).

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In support of its motion, the Staff argues that although the Staff's testing procedures are proper subjects for litigation the manner in which these procedures reflect upon the Staff's attitude is not; that the Commission did not authorize the Licensing Board in the restart proceeding to consider the Staff's "attitude," and that the Kemeny Commission's report was the subject of litigation before the Licensing Board, which made specific findings on the Staff's licensing examinations and did not hold open those findings pending the Special Master's report on cheating. None of these arguments is persuasive.

The first argument assumes that the Staff's attitude is the issue, and that evidence of the Staff's procedures is the means to decide that issue. The point, however, is that the Staff's procedures are the issue and the Staff's attitude is evidence of how those procedures will be administered. One of the issues (Issue 10) which the Licensing Board listed as relevant to this reopened proceeding is the following:

. . . the adequacy of the administration of NRC licensing examinations for TMI-1 personnel, including proctoring, grading, and safeguarding the integrity of examination materials; in addition, the adequacy of the Staff's review of the administration of Licensee's Category T examinations; also the adequacy of the Staff's plan for retesting operators and monitoring its NRC examinations to assure proper adherence to NRC testing requirements and to provide reasonable assurance that TMI-1 can be operated safely. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289, unpublished order at 4 (October 14, 1981).

It is obvious that the Staff's attitude toward its examination program in the past -- as shown, for example, by the

resources committed, the extent to which procedures are followed, the instructions given to proctors and graders, -- is crucial to deciding how much confidence one can have in the adequacy of that program in the future. Enough questions have been raised about the Staff's practices to warrant asking whether the Staff's attitude has been proper, and whether it is likely to change.

The Staff's second argument, that the Commission did not authorize the Licensing Board to consider the Staff's "attitude," is simply at odds with the Commission's actual authorization. The Licensing Board was given the power to decide whether the "short term actions" recommended by the Director of Nuclear Reactor Regulation are "necessary and sufficient" to assure safety of operators at Three Mile Island Unit 1. Metropolitan Edison Company, (Three Mile Island Nuclear Station, Unit No. 1), CLI 79-8, 10 NRC 141, 148 (1979). Among those short term actions is an augmented training program for reactor operators, the effectiveness of which is to be measured by the NRC Staff through "complete examinations to all licensed personnel in accordance with 10 CFR 55.20-23." Id. at 144. By this language, the adequacy of the NRC's examination process is placed directly in issue, and, as noted above, the Staff's attitude is relevant to predicting whether this process will be adequate in the future. Indeed, after a finding by the Staff's own investigators that the Staff's proctoring and grading system failed to prevent or detect a blatant form of cheating, it is surprising to find the Staff still insisting that its attitude

should not be brought into question. It is very likely that the cheating which occurred could have been prevented or detected by a more careful process of proctoring and grading. Is it possible then to say that the process which actually was used had nothing to do with the Staff's attitude, or that the Staff's attitude will not be important in the future? Such an argument is simply not credible.

The Staff's third argument is that because the Licensing Board, in its Partial Initial Decision (P.I.D.) of August 27, 1981, made specific findings on operator training and the NRC's examination process, these matters have already been litigated. The Staff points to Paragraph 206 of the P.I.D., where the Licensing Board describes the Staff's testimony to the effect that the Staff has broadened the licensing examinations to include additional subject matter, that the Staff has imposed time limits for answering the examinations and has increased the passing grade. The Staff states in the brief supporting its motion that "these issues, which were specifically resolved by the Board and were not left open pending the hearing on the cheating incident, should not be relitigated." The Staff's brief, however, does not mention that the Licensing Board's finding in Paragraph 206 is expressly qualified by a footnote. Footnote 19 is to the first sentence of Paragraph 206; it is on the same page as Paragraph 206; it incorporates Footnote 18, the text of which is two and one half inches below the number "206". Footnote 18 reads as follows:

. . . the validity of the NRC examination is called into question by the lack of safeguards and integrity in the

testing process indicated in the preliminary Stello Memorandum and OIA report on the investigation of cheating on the written examination taken by Licensee's personnel. Accordingly, this finding is an example of ones which will be reconsidered by the Board after further information on the investigation of cheating is available.

In Paragraph 584(c) of the P.I.D., which contains the Licensing Board's sole conclusion of law on operator testing, there is also a footnote. That footnote is number 63. The text of that footnote is on the same page as Paragraph 585(c). Footnote 63 reads as follows:

[b]ecause of the pendency of the inquiry into the matter of cheating on the NRC operator license examinations, the Board omits for now any conclusion respecting operator testing and licensing.

Anyone who reads footnotes can see that operator testing is open to be litigated.

The Staff's final request is that the Special Master certify this ruling to the Licensing Board in the event that the Special Master does not grant the Staff's motion. In the opinion of the Special Master, this motion comes nowhere near meeting the standard laid down by the Licensing Board for interlocutory review of the Special Master's decisions. That standard is the same as that for directed certification to the Atomic Safety and Licensing Appeal Board, and is set forth in Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977). According to Marble Hill, discretionary interlocutory review is proper only where the ruling

(1) threaten[s] the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affect[s] the basic structure of the proceeding in a pervasive or unusual manner.

The inclusion of Staff's attitude toward its examination procedures as an evidentiary matter in this proceeding will not have the effect described by the above language.

In view of the above discussion, the Staff's motion is denied, and the Staff's request for directed certification is also denied.

IT IS SO ORDERED.


Gary L. Milhollin
ADMINISTRATIVE JUDGE

Bethesda, Maryland

October 27, 1981