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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'95 MAR -2 P4:21

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of

KENNETH G. PIERCE

)
) Docket No. 55-30662 - EA
) IA-94-007
)
) (License No. OP-30277-02)
)

NRC STAFF REBUTTAL TO THE PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW FILED BY KENNETH G. PIERCE

I. INTRODUCTION

As instructed by the Atomic Safety and Licensing Board (Board) by internal e-mail on February 13, 1995, the NRC Staff (Staff) hereby files a rebuttal to "Kenneth G. Pierce's Proposed Limited Findings of Fact and Conclusions of Law Concerning the Order Dated April 21, 1994 Issued to Kenneth G. Pierce" (Pierce Findings and Conclusions) filed by Kenneth G. Pierce on February 21, 1995.¹ In his proposed findings, Mr. Pierce asserts that he followed established practices at the Dresden plant after he mispositioned a rod on September 18, 1992, and that there was no conspiracy, in which he participated, to conceal the mispositioned rod from Dresden management. However, Mr. Pierce's proposed findings of fact are not supported by the record.

¹ Mr. Pierce asked for an extension of time by written motion filed February 9, 1995, which requested a week's delay in the date originally scheduled for his proposed findings, namely, a postponement from February 13 to February 21, 1995. On February 13, the Chairman notified Staff counsel that he had granted Mr. Pierce the extension of time by telephone and granted an extension to the Staff to March 2 for express mail to Mr. Pierce and March 3, 1995, for filing with the Board.

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II. DISCUSSION

A. Staff Rebuttal to Pierce Findings of Fact on the Issue of Deliberate Misconduct

1. Pierce Finding 1 does not accurately reflect the October 27, 1994, Inspection Report 94015 for the Dresden Station which provides the basis for the finding. Although the October Report is not designated in the transcript as an admitted document, both the September 9, 1993, Inspection Report 92033 by the Special Inspection Team, which was admitted, and one part of the October 27, 1994, Inspection Report are inserted in the transcript together. *See*, Tr. 236-237, 243. The portion of the October 27, 1994, Inspection Report in the transcript concerns an allegation Mr. Pierce made to Region III in the summer of 1994, concerning mispositioned rods at Dresden Unit 2 in 1986. *See*, Tr. 324. This allegation was investigated during the Staff's routine inspection during August-October 1994. The October 1994 Inspection Report concerning the 1986 mispositioned rods states, in pertinent part:

The inspectors concluded the movements of P-6 and D-3 [described in the preceding paragraphs] were mispositioned rods. During interviews the operators stated that the control and documentation of control rod movements out-of-sequence in 1986 was not always in accordance with procedure. The operators also stated control rods were commonly moved out-of-sequence on the advice of the qualified nuclear engineer and were not considered mispositioned control rods. However, the inspectors found that control rod movements out-of-sequence were generally documented in the nuclear engineers log and in the control rod sequence change log.

See, October 27, 1994, Inspection Report 94014, ff. Tr. 243, p. 10. In short, the October 1994 Inspection Report states, in regard to Mr. Pierce's allegation, that the inspectors found that, although mispositioned rods in the one incident in 1986 were not

logged by the operators, it was common practice to document out-of-sequence (mispositioned) rods in the logs of the nuclear engineer, and thus, they were reported to management.

2. Pierce Finding 7 incorrectly attributes certain statements to Mr. Miller, whereas only the OI transcript of Mr. Pierce's statements is referenced. The statements attributed to Mr. Miller are actually those of Mr. Pierce. OI Ex. 41 is the interview of Mr. Pierce (Staff Ex. 12).

3. Pierce Finding 24 does not accurately reflect the statements of Messrs. Tang Wee, Marotto, Miller and Piccard to Commonwealth Edison Company (CECo) representatives at Dresden Nuclear Station and to the NRC Staff in statements recorded in 1992 and 1993. Contrary to what is suggested in Finding 24, three of the witnesses to the mispositioned rod event consistently stated in all interviews that there was an agreement among the five persons involved to keep the mispositioned rod secret from management. *See*, Table of Witness Statements in "NRC Staff Proposed Findings of Fact and Conclusions of Law Concerning the Order Dated April 21, 1994, Issued to Kenneth G. Pierce," dated January 23, 1995, pp. 4-16, and footnote 13, page 45 where the witnesses' confusion over the two places in the control room where Mr. Tang Wee directed secrecy is discussed.

4. Pierce Finding 28 does not accurately reflect the statement of Mr. Ken Wynn, a Dresden reactor operator, in OI Ex. 22, p. 1. In the transcribed interview, Mr. Wynn actually stated, "I assume it was OK if the rod moves was approved by QNE & SCRE." Contrary to Pierce Finding 28, Mr. Wynn did not state that Mr. Pierce's

actions were acceptable. Furthermore, in the NRC interview on December 3, 1992, (OI Ex. 44), Mr. Wynn stated that if a control rod is inadvertently moved more than one notch, it has to be reported; he would not follow directions from a QNE contrary to procedures unless he first consulted the SCRE; and the [mispositioned] rod must be corrected before anything else is done. OI Ex. 44, pp. 44-45.

5. Pierce Finding 36 quotes Staff witness Mr. Jordan out of context. Mr. Jordan stated that "Any rod movement affects reactivity and it is not immediately apparent what the corrective action is for an unintended rod movement. That is why the proper correction for a mispositioned rod is that set out in DOA 300-12." Jordan, ff. Tr. 26, p. 6.

6. Pierce Finding 38 ascribes to Staff witness Mr. Jordan a statement he did not make. Actually, Mr. Jordan explained that after a rod is mispositioned the QNE must develop a new sequence to address the mispositioned rod after the rod is driven to 00 position. Tr. 56-57.

7. Pierce Finding 44 incorrectly states that Mr. Jordan testified that "something over half of the candidates (taking their initial license exam) did not respond correctly to a mispositioned rod" He actually stated that after the September 1992 event, at the next initial exam for operators, "We found that, some of them, or a percentage of them, that did not respond correctly to a mispositioned rod at that time." See, Tr. 71-72.

8. Pierce Finding 45 quotes the testimony of Staff witness Mr. Peterson out of context. When Mr. Peterson made the statement attributed to him by Mr. Pierce, he

was reading a portion of Dresden procedure 07-02 and also read into the record another portion of that procedure which states" . . . it is also the responsibility of all Operations personnel to be aware of applicable procedures for a given evolution, to follow the procedures" *See*, Tr. 76-78.

9. Pierce Finding 47 incorrectly quotes Mr. Jordan. At the transcript page referenced, Mr. Jordan is answering questions from Judge Cole as to the appropriate rods to select to avoid nuisance alarms. *See*, Tr. 87. Mr. Jordan did not state that peripheral rods are the least likely to cause problems. His testimony stated that any rod movement is potentially significant, regardless of location. *See*, Tr. 88-89.

10. Pierce Finding 49 should be rejected because it incorrectly quotes Mr. Peterson. Mr. Peterson did not state that the QNE is responsible for directing the operator in procedures. His testimony was the exact opposite. *See*, Tr. 103. *See, also*, Peterson testimony ff. Tr. 26, p. 3, Tr. 32-33, 93-95.

11. Pierce Finding 79 quotes Staff witness Mr. Anderson's statement out of context. Mr. Anderson was asked if any witness other than Mr. Miller had heard Mr. Pierce respond affirmatively to Mr. Tang Wee's direction for secrecy, and Mr. Anderson replied that the other witnesses did not remember a verbal response by Mr. Pierce. *See*, Tr. 141-142.

12. Pierce Finding 80 states that Mr. Anderson testified that one witness recalled Mr. Tang Wee making a statement that information about the mispositioned rod was not to leave the control room. However, Mr. Pierce quotes Mr. Anderson's statement out of context. Mr. Pierce had asked Mr. Anderson whether any witness other

than Mr. Miller heard Mr. Pierce's verbal response to Mr. Tang Wee. Then Judge Boch asked Mr. Anderson "And how many of the other three said that [Mr. Tang Wee directed secrecy]." Mr. Anderson did not understand the question to which he replied "I believe one other one." However, on the same transcript page, when the question is clarified he stated "No, they [the engineers-in-training] could not recall where that particular statement [for secrecy] was made, whether it was behind the back panel or at the SCRE's desk,-- Mr. Tang Wee's desk. They could not recall exactly, but they do recall that statement was made." *See*, Tr. 142-143.

13. Pierce Finding 82 incorrectly characterizes Mr. Anderson's comment on the memory of individuals in the control room. Mr. Anderson explained, in answer to a question about where the direction for secrecy took place, that the memories of the witnesses began to fade because there were two directions for secrecy in two different places in the control room. *See*, Tr. 156-157.

14. Pierce Finding 84 mischaracterizes the record developed with respect to the false statements made by Mr. Pierce. Mr. Anderson was asked to identify the question asked Mr. Pierce, which Mr. Pierce did not truthfully answer, and Mr. Anderson requested time to refer to his documents. The transcript pages, referenced by this finding, contains only discussions of other matters by the Chairman, Staff Counsel, and Mr. Pierce. *See*, Tr. 159-166. However, Mr. Anderson answered the question at Tr. 173-178, and demonstrated that Mr. Pierce was asked in various ways whether he agreed to keep the mispositioned rod secret.

15. Pierce Finding 90 takes Mr. Miller's statement out of context. Mr. Miller was asked if he knew whether Mr. Tang Wee knew they were doing something wrong by keeping the mispositioned rod secret from management. Mr. Miller stated he believed Mr. Tang Wee did know that to conceal the mispositioned rod was wrong, but when asked if he remembered anything Mr. Tang Wee had stated, Mr. Miller replied he did not remember anything specific. When asked again why he believed Mr. Tang Wee knew their actions were wrong, Mr. Miller replied he was not sure. *See*, Tr. 196-197.

16. Pierce Finding 94 quotes a statement by Mr. Piccard concerning levity in the control room out of context. Mr. Piccard stated in his prefiled testimony that Mr. Tang Wee had warned him and Mr. Marotto about too much levity in the control room and also, in the same conversation, Mr. Tang Wee stated that the mispositioned rod should not be discussed outside the control room. Piccard testimony ff. Tr. 193, p. 3. At hearing, Mr. Pierce questioned Mr. Piccard about Mr. Tang Wee's discussion about "too much levity" and Mr. Piccard answered the question as he understood it. He did not change his testimony. *See*, Tr. 203-210.

17. Pierce Finding 98 does not accurately reflect the record. Mr. Piccard stated it was difficult for him to distinguish between what he had read in the witnesses' statements recorded by CECO, and what he remembered, but that when he wrote his testimony he thought long and hard and wrote what he believed is true. *See*, Tr. 213-214.

18. Pierce Finding 107 incorrectly implies that the Office of Enforcement does not consider the motivation of the wrongdoer. Mr. Rosano testified that the person's

state of mind is one factor considered in assessing sanctions in regard to the benefit to the individual, by inquiry into "what he knew or where he expected to get to by doing [the action]." *See*, Tr. 233-234.

19. Pierce Finding 110 incorrectly implies that Mr. Rosano alone made the decision to issue the order to Mr. Pierce. Mr. Rosano's testimony clearly states that decisions for enforcement actions are made only after review, discussion, and recommendations by the Regional and Headquarters Staff. Mr. Rosano testified that in this case, the Offices of Nuclear Reactor Regulation (NRR) and Investigations (OI) concurred with the Office of Enforcement (OE) in the action, as did the Regional Administrator in Region III, the Deputy Executive Director for Nuclear Reactor Regulations, Regional Operations, & Research, and the Executive Director for Operations, with legal counsel from the Office of the General Counsel. *See*, "Testimony of Richard P. Rosano concerning the Order Dated April 21, 1994 issued to Kenneth G. Pierce" ff. Tr. 219, p. 3 and attached Professional Qualifications; Tr. 234, 235.

20. Pierce Finding 115 is incomplete. Judge Block stated "I would note that the special inspection report that we had bound in this morning on Page 9 has concluded that this particular event was not reportable to the NRC." *See*, Tr. 257.

21. Pierce Finding 130 is inconsistent with other testimony of Mr. Mosey following Tr. 275 wherein Mr. Mosey stated that the SRO (SCRE) is in charge of the control room so that when Mr. Mosey mispositioned a control rod, he did not ask the QNE for instructions, but reported it to the SCRE, who instructed him to follow the

mispositioned rod procedure, and did not suggest that the mispositioned rod should be kept secret. *See*, Tr. 276-277.

22. Pierce Finding 132 is contradicted in subsequent testimony given by Mr. Mosey. *See*, Tr. 275; 276-277.

23. Pierce Finding 182 does not accurately reflect the record. Mr. Pierce actually stated at the hearing that on March 31, 1989, he was instructed by the SRO to move a control rod and Mr. Pierce refused to obey the instruction because he thought he knew more than the SRO. Contrary to the assertion in the finding, Mr. Pierce's refusal to follow instruction by the SRO, demonstrates his unwillingness to comply with proper directions. *See*, Tr. 341-342.

B. Staff Rebuttal to Pierce's Proposed Board Findings on the Issue of Deliberate Misconduct

The Staff generally objects to Mr. Pierce's proposed Board findings (Findings 185-196) because they are not based on the evidence of record, or describe matters unrelated to the issues of deliberate misconduct and failure to provide accurate information to NRC. As set out above, some of Mr. Pierce's proposed findings of fact are not accurate descriptions of the record. Otherwise, Mr. Pierce's proposed Board findings either misinterpret the evidence or deal with material not related to his agreement to keep the mispositioned rod secret from Dresden management.

C. Staff Rebuttal to Pierce Proposed Conclusions of Law

Mr. Pierce first proposes that the Board find that Mr. Pierce "acted in accordance with Dresden's policies in effect at the time." Pierce Conclusions, p. 58.

Mr. Pierce cites and emphasizes a portion of Section VIII of 10 C.F.R. Part 2, Appendix C which states that enforcement actions against individuals will not be taken when the improper action was caused by management failure. *Id.*, p. 57, fn. 2. However, the record shows that it was Dresden's policy that mispositioned rods be reported to management; Mr. Pierce knew this policy and Mr. Pierce agreed with four others not to report the mispositioned rod to Dresden management, and thus, to deliberately disobey the policy. Therefore, Mr. Pierce did not act in accord with Dresden's policies in effect at the time. Accordingly, Mr. Pierce's proposed conclusion that it was Dresden policy to keep mispositioned rods secret from management should be rejected. Contrary to Mr. Pierce's Conclusion, the following portion of Section VIII of Appendix C is applicable to Mr. Pierce's actions.

Enforcement actions involving individuals, including licensed operators . . . will be taken only when the NRC is satisfied that the individual fully understood, or should have understood, his or her responsibility; knew, or should have known, the required actions; and knowingly, or with careless disregard (*i.e.*, with more than mere negligence) failed to take required actions which have actual or potential safety significance.

More serious violations, including those involving the integrity of an individual (*e.g.* lying to the NRC) concerning matters within the scope of the individual's responsibilities will be considered for enforcement action against the individual as well as against the facility licensee.

Since the evidence shows that Mr. Pierce knew the required action to report and knowingly failed to report the mispositioned rod, it is clear that the order was based on a correct application of the Enforcement Policy. The Board should find that Mr. Pierce engaged in deliberate misconduct by agreeing with four others to keep the mispositioned

rod secret in violation of Dresden policy and procedures in an event which had potential safety significance.

Secondly, Mr. Pierce proposes that the Board conclude that Mr. Pierce did not fail to provide complete and accurate information to the NRC in violation of 10 C.F.R. § 55.9. Pierce Conclusions, p. 58. This proposal is based on Mr. Pierce's conclusion that the four witnesses to the coverup had difficulties in recalling specifics about the events in the control room on September 18, 1992. However, as pointed out above, the record does not support Mr. Pierce's conclusion. The evidence shows that the four witnesses had no difficulty in remembering, in consistent testimony during many interviews, that there was a discussion among the five individuals about the control rod behind the panel. In addition, three witnesses had no difficulty remembering, in many interviews, that there was an agreement among the five to keep the event secret. Finally, two of the witnesses had no difficulty remembering, in direct testimony and during cross examination at hearing, that Mr. Pierce verbally and by silent acquiescence, agreed to the coverup. Consequently, when the consistent and repeated testimony of the four witnesses over a two year period is reviewed, along with the testimony of witnesses at hearing, it is clear that Mr. Pierce participated in the conspiracy to keep the mispositioned rod secret from Dresden management. It is also clear that the witnesses to the agreement stated that Mr. Pierce understood Mr. Tang Wee's direction for secrecy. Therefore, the Board should reject Mr. Pierce's proposed conclusion and find that he did deliberately fail to provide the NRC investigators with accurate information in violation of 10 C.F.R. § 55.9.

Thirdly, Mr. Pierce proposes that the Enforcement Policy was not properly applied because Mr. Pierce's action was caused by management failure and resulted from following the technical advice of an expert. Pierce Conclusions, pp. 58-59. However, the record clearly shows that Dresden management expected mispositioned rods to be reported, since it had informed its personnel that sanctions would be imposed for them. The record also shows that Mr. Pierce was personally informed of this policy. Therefore, Mr. Pierce's assertion that Dresden management caused Mr. Pierce to keep the mispositioned rod secret is without evidentiary support. Moreover, contrary to Mr. Pierce's claim, it is clear that his "inadvertent mistake" of mispositioning the control rod was not caused by management failure, but by Mr. Pierce's negligent inattention to his actions. Finally, the decision by Mr. Pierce to follow the direction by Mr. Tang Wee was clearly Mr. Pierce's personal responsibility. Accordingly, the Board should find that the order issued to Mr. Pierce was based on a correct application of the Commission's Enforcement Policy to impose sanctions against individuals who knowingly violate their responsibility in a situation with potential safety significance and who demonstrate a lack of integrity by making false statements to the NRC.

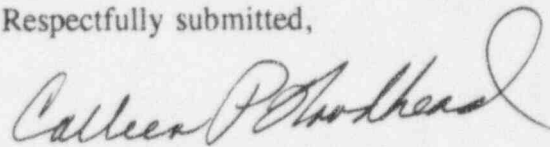
In sum, nothing in Mr. Pierce's proposed findings points to any evidence which challenges the consistent statements by the eyewitnesses to the mispositioned rod event, that Mr. Pierce participated in an agreement to keep the event secret from Dresden management. In addition, nothing in Mr. Pierce's findings offers anything but a mere denial that he failed to answer truthfully the many questions asked by the NRC Staff concerning the agreement for secrecy. Furthermore, Mr. Pierce and his witnesses did

not dispute the clear evidence of deliberate misconduct by Mr. Pierce when he agreed to conceal the mispositioned rod from Dresden management. Therefore, the Board should conclude that Mr. Pierce's proposed findings and conclusions fail to raise a question concerning the evidence of record that Mr. Pierce engaged in deliberate misconduct and deliberately avoided providing truthful answers to the NRC investigators, in violation of 10 C.F.R. §§ 50.5 and 55.9. Having concluded this, the Board should sustain the April 21, 1994, order issued to Mr. Pierce.

III. CONCLUSION

For the reasons set out above, the Board should find that Mr. Pierce's proposed findings of fact and conclusions of law do not indicate any record evidence which contradicts the Staff's conclusion that Mr. Pierce engaged in deliberate misconduct and lied to the NRC in violation of 10 C.F.R. §§ 50.5 and 55.9. Accordingly, as set out in the Staff's proposed findings of fact and conclusions of law, the Board should conclude that Mr. Pierce violated the Commission's regulations and sustain the April 21, 1994 order.

Respectfully submitted,



Colleen P. Woodhead
Counsel for NRC Staff

Dated at Rockville, Maryland
this 2nd day of March 1995

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In the Matter of

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF REBUTTAL TO THE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED BY KENNETH G. PIERCE" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by a double asterisk by express mail this 2nd day of March 1995.

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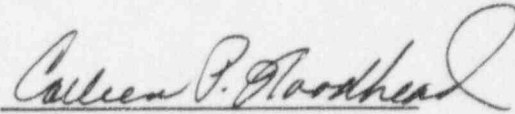
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A handwritten signature in cursive script, reading "Colleen P. Woodhead". The signature is written in dark ink and is positioned above the printed name and title.

Colleen P. Woodhead
Counsel for NRC Staff