

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

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USNRC

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Before Administrative Judges

John H Frye, III, Chairman
Glenn O. Bright
Dr. Emmeth A. Luebke

OFFICE OF SECRETARY
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In the Matter of
THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA
(UCLA Research Reactor)

Docket No. 50-142 OL
(Proposed Renewal of
Facility License)

ASLBP 80-444-05 OL

February 24, 1984

MEMORANDUM AND ORDER

On Friday afternoon, February 17, 1984, the Board's law clerk read the following message to counsel for CBG, UCLA, and Staff:

The Board has reviewed the physical security plan and security inspection reports furnished to the Board by UCLA on January 31, 1984. As a result of this review, the Board is concerned that substantial misrepresentations may have been made to it by UCLA and Staff regarding sabotage matters raised by Contention XX. No further steps are to be taken by the parties toward a resolution of Contention XX until such time as the matter of the potential misrepresentations has been resolved. A memorandum and order on this matter will issue next week.

The purpose of this Memorandum and Order is to detail our concerns and order responses to them.

We begin with a history of the proceedings on Contention XX. CBG first filed its security contention, then numbered XIX and XXI, on August 25, 1980. It stated a generalized concern that UCLA's security plan was inadequate and noted CBG's inability to further specify its

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concern without access to the security plan. UCLA opposed these contentions on the ground that they were too speculative to be admitted (See University's response of September 9, 1980, at 9). Staff, in their September 16, 1980, response, took the position that no bases had been provided. However, Staff noted the difficulty of formulating a security contention because the relevant information is generally unavailable. Consequently, Staff suggested that a ruling be deferred to afford Staff an opportunity to explain the regulatory requirements to CBG. Staff would then report whether CBG's concerns had been satisfied or whether it wished to file a specific contention (See Staff's response to September 16, 1980, at 30-33). Staff's follow up on its suggestion is set out in Staff Counsel's letters to the Board of October 27 and December 3, 1980, the latter enclosing a letter to the parties from CBG dated November 6, 1980. CBG's November 6 letter enclosed the security contention substantially in its present form.

In its response of November 28, 1980, UCLA again opposed the security contention as lacking bases. Staff took a similar position in its December 1, 1980, response. At a prehearing conference held February 5, 1981, Staff took the position that the contention sought to apply power reactor standards to this reactor and that there was no requirement that non-power reactors protect against sabotage (See Tr. 377, 394-95). In a prehearing conference order of March 20, 1981, the Board admitted Contention XX with a modification.

Staff, on April 13, 1981, promptly moved for summary disposition of this contention despite the fact that the schedule adopted by the Board

did not permit such motions prior to the close of discovery. On April 30, we ruled that this motion was premature, and on June 9 adhered to that ruling in response to Staff's motion for reconsideration. The efforts of the parties to agree on a protective order and nondisclosure agreement to safeguard sensitive information were unavailing. Hence discovery was not accomplished.

In our Prehearing Conference Order of July 26, 1982, we directed CBG to respond to certain portions of Staff's motion which raised legal or factual issues which did not require that CBG be given access to sensitive information. That response lead to our rulings in LBP-83-25A, 17 NRC 927 (1983) and LBP-83-67, 18 NRC _____ (October 24, 1983) that 10 CFR § 73.40(a) requires that UCLA take some measures to protect against potential sabotage.

Throughout these proceedings until February 15, 1984, we had been lead to believe by Counsel that, first, Staff saw no requirement in the regulations that UCLA provide such protection and imposed no such requirement, and second, that UCLA's security plan indeed provided no such protection.

University wishes to note that its security plan, which is not designed to provide protection against sabotage, has been approved by the Commission's safeguards branch; and that the low-power university research reactor licensees have never been required to adopt security plans designed to protect against sabotage. Surely the Commission's consistent practice in interpreting and applying its own safeguards regulations to licensees such as University is entitled to considerable weight in this proceeding.

University's August 25, 1983, Response in Support of NRC Staff Petition for Reconsideration of the Licensing Board's Memorandum and Order Ruling

on Staff's Motion for Summary Disposition, at 2-3. This document lists Donald L. Reidhaar, Glenn R. Woods, and Christine Helwick as attorneys for UCLA and is signed by William H. Cormier.

In her petition for reconsideration of LBP-83-25A, dated August 15, 1983, Staff Counsel stated:

The Board errs in believing that a general but unspecified requirement for protection against sabotage exists in § 73.40(a) which would provide ad hoc regulating authority to Staff and/or Licensing Boards. That section clearly contains a provision for application of the requirement according to specific regulations applicable to the facility and SSNM of licensees. Since § 73.67 contains specific physical security requirements for fixed site licensees with SNM of moderate and low strategic significance, it is contradictory to assume that only a general unspecified requirement has been issued for protection against sabotage for the same licensees. (Emphasis in original)

Petition at 10.

In sum, § 73.40(a) merely states a general requirement for protection against sabotage according to specific regulations and security plans which are approved by the Commission. Licensees with low and moderate amounts of SNM are required to comply with § 73.67 which does not, by its stated objectives, aim at protection against sabotage. The Commission's Staff has approved the UCLA security plan. The Staff has stated it does not view sabotage protection necessary for research reactors. (Carlson affidavit supra).

Petition at 14.

Following our ruling in LBP-83-67, UCLA's attorneys and Staff Counsel responded to our requests for views on the status of Contention XX. UCLA's attorneys stated:

. . . the Board's interpretation of Sec. 73.40(a), as applied to the UCLA facility, is clearly inconsistent with the practice of those within the Commission who are responsible for interpreting and applying the Commission's safeguards regulations.

University's Position Concerning Contention XX, December 13, 1983 at 2.

Staff Counsel stated:

Similarly the Staff's position, that no additional safeguards to protect against sabotage are required for UCLA remains the same for the reasons previously explained.^{15/} The Staff continues to believe the safeguards in place at UCLA are sufficient to protect against both sabotage and theft, even if § 73.40(a) were applied. This is in accord with the Appeal Board's decision in Columbia University^{16/} where a security system of keys/locks/and alarms similar to that at UCLA was required for both sabotage and theft. However, pursuant to the Board's suggestion,^{17/} the Staff has forwarded to the Commission a proposed clarification to § 73.40(a).^{18/}

^{15/} Staff advised the Board in the affidavit attached to its motion for summary disposition, that it does not view risk from sabotage at research reactors as significant. In its motion for reconsideration Staff indicated a study of risk from sabotage at research reactors had been performed which demonstrated that small reactors such as the Argonaut-UTR presented no risk.

^{16/} Trustees of Columbia University, ALAB-50, 4 AEC 849, 855-856 and Appendix (1972).

^{17/} Memorandum and Order, op. cit., p. 11.

^{18/} The Staff has proposed to the Commission for rulemaking, a clarification to the rule to clearly indicate the established practice of evaluating security plans. The Staff will promptly notify the Board and parties of the Commission's decision on this proposal.

NRC Staff Response to Board Order Concerning Contention XX, December 13, 1983, at 5.

The document referred to in footnote 18 of the Staff's response quoted above is SECY-83-500. It states:

Staff's policy and practice has been to provide detailed requirements in Part 73 that are sufficient to define the extent to which protection against sabotage or theft, or both, must be addressed by specific classes of licensees. Therefore, if a licensee satisfies the detailed requirements in the section which applies to its specific class, the general requirement in Section 73.40(a) will be satisfied. This is the staff's practice even when the detailed requirements mention only theft or only sabotage as a

threat. Physical security plans are evaluated and approved on this basis.

There has been a long-standing policy that acts of sabotage are not included in Section 73.67. The issue of physical protection for special nuclear material of moderate and low strategic significance (Category II/III) materials was first presented to the Commissioners in SECY77-79. Staff recommended that no specific protection measures should be required for dispersion scenarios.

SECY-83-500 at 2.

This theme is repeated on page 3 of SECY-83-500:

The threats of both sabotage and theft cited in Section 73.40(a) have not been applied to all types of licensees. The sections of Part 73 treating specific licensee classes have been used to define the necessary physical protection measures for each class.

It thus was clear to us, based on the representations of Counsel, that UCLA's physical security plan was not designed to provide protection against sabotage and that Staff did not require that such protection be provided. However, the security plan and security inspection reports furnished by UCLA indicate that the opposite is true.

We were astounded to read in the first sentence of the first paragraph of the text of UCLA's physical security plan that it was indeed the purpose of the plan to provide ". . . for the protection of the reactor, protection of the staff and the general public against radiological sabotage and to prevent and detect theft of Special Nuclear Material." The general performance objectives of the physical security system and organization, listed in the second paragraph of the text, include protection of the reactor, its equipment, and the SNM from acts of radiological sabotage. A perusal of the plan reveals several provisions which are aimed at providing such protection. It appears

that it has been the purpose of the plan to provide such protection from the time of its submittal to NRC on March 10, 1980.

We were even more astounded to find that every Part 73 security inspection report furnished by UCLA indicates that Staff did, in fact, examine UCLA's activities related to physical protection against sabotage "in accordance with applicable requirements of Title 10, Code of Federal Regulations, Part 73." The reports furnished are for the years 1975 through 1979 and 1982. Moreover, on November 9, 1983, Staff amended UCLA's existing license to require UCLA to ". . . maintain and fully implement all provisions . . ." (emphasis supplied) of the physical security plan submitted March 10, 1980, as amended. Thus Staff formally required UCLA to take steps to provide for protection against radiological sabotage on that date. We have referred these matters to the Commission's Office of Inspector and Auditor in connection with their ongoing investigation.

In light of these revelations, we are confronted with the question whether Counsel may have violated Model Rules of Professional Conduct 3.1, 3.3, 3.4, and 8.4 and whether we should take action against Counsel pursuant to 10 CFR § 2.713.

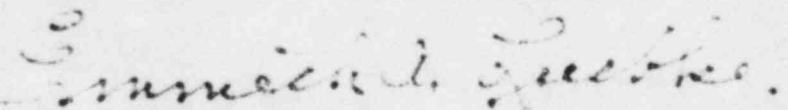
Prior to deciding these questions, we will afford Counsel an opportunity to demonstrate why such action should not be taken against them. Donald L. Reidhaar, Glenn R. Woods, Christine Helwick, William H. Cormier, and Colleen P. Woodhead shall have until March 9, 1984, to file their responses.

In addition, the Board wishes to know to what extent the written representations of these attorneys have been reviewed and approved by

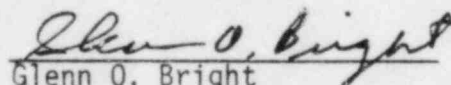
others within their respective organizations. The parties are reminded that 10 CFR § 50.100 provides in part that "[a] license . . . may be revoked, suspended, or modified, in whole or in part, for any material false statement in the application for the license or in the supplemental or other statement of fact required of the applicant" The Regents of the University of California and the NRC Staff are to indicate, by March 9, 1984, the extent to which they were aware of the representations being made by counsel, whether they approved of these representations, and whether they sought to make any corrections to them. In its response, NRC Staff is to indicate whether any inspections of this facility pursuant to 10 CFR Part 73 were conducted by it in 1980, 1981, and 1983. If such inspections were conducted, unexpurgated copies of the entire inspection reports are to be furnished to the Board only.

It is so ORDERED.

THE ATOMIC SAFETY AND LICENSING BOARD



Emmeth A. Luebke
ADMINISTRATIVE JUDGE



Glenn O. Bright
ADMINISTRATIVE JUDGE



John H. Frye, III, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland,
this 24th day of February, 1984.