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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'84 MAY 30 P2:44

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges
Marshall E. Miller, Chairman
Glenn O. Bright
Elizabeth B. Johnson

OFFICE OF SECRETARY
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SERVED MAY 30 1984

In the Matter

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Generating Plant,
Unit 1)

Docket No. 50-322-OL-4
(Low Power)

May 30, 1984

ORDER EXPUNGING RULE TO SHOW CAUSE

On April 13, 1984 this Board entered an Order which amounted to a rule to show cause why disciplinary action should not be imposed upon Douglas J. Scheidt, Esq., one of the attorneys representing the Intervenor Suffolk County. The bases for this rule to show cause were gratuitous statements contained in two letters by Mr. Scheidt pertaining to document requests, stating that our prior scheduling order entered on April 6 was "illegal."¹ In its show cause order, the Board cited

¹ These statements in Mr. Scheidt's discovery cover letters dated April 11, 1984, are as follows: "Suffolk County believes that the Board's April 6 Memorandum and Order is illegal, for reasons which include the fact that the schedule denies the County due process of law."

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judicial definitions set forth in a standard Legal Thesaurus, wherein the word "illegal" could have connotations such as illicit, criminal, and the like,² as well as meaning only contrary to governing sources of law.

Under the circumstances then prevailing, it was not clear which meaning was intended by counsel. His client, Suffolk County, both then and later, filed certain letters directly with the Commissioners that contained certain derogatory references to this Board (Letters from Peter F. Cohalan, Suffolk County Executive, or Frank R. Jones, Deputy Suffolk County Executive, to the NRC Commissioners and others, dated

² Legal Thesaurus by William C. Burton (MacMillan Publishing Co., Inc. 1980) contains the following definitions at page 257:

"Illegal, adjective - actionable, against the law, banned, contrary to law, criminal, exceeding the law, felonious, forbidden, illegitimate, illicit, impermissible, improper, illicitus, invalid, lawless, not according to law, not allowed, not approved, not authorized by law, not covered by law, not permitted, not valid, outlawed, outside the law, prohibited, prohibited by law, proscribed, punishable, quod contra leges fit, unauthorized, unchartered, unconstitutional, unjustified, unlawful, unsanctioned, unwarrantable, unwarranted, vetitus, without authority, wrongful.

"Illegality, noun - corruptness, criminality, illegitimacy, impropriety, infraction, infringement, lawlessness, malefaction, misdeed, transgression, unauthorization, underhandedness, unfitness, unlawfulness, violation of the law.

"Illegally, adverb - contrary to law, criminally, feloniously, illegitimately, illicitly, impermissibly, improperly, in violation of law, tortiously, unlawfully, without legal authority, without legal sanction, wrongfully."

April 11, April 27 and May 23, 1984). Under normal legal practice, when a client is represented by a lawyer, the lawyer alone is responsible for presenting the client's case to the adjudicators.³ The NRC Commissioners are an integral part of our adjudicatory process and they constitute the highest appellate body to review decisions and orders of the licensing boards. The Commissioners are in fact the ultimate NRC adjudicatory tribunal, and therefore they do not normally receive ex parte communications in pending cases. Accordingly, it was not then clear precisely what role Mr. Scheidt as an attorney was playing in these matters, and he was given the opportunity by our show cause order to show what meaning he intended to convey by his use of the word "illegal."

On May 1, 1984, retained counsel representing Mr. Scheidt filed a "Suggestion for Expungement of Order to Show Cause Against Douglas J. Scheidt." This filing stated that the term "illegal" was not intended to suggest that the Board's conduct "was a deliberately felonious act or involved criminal conduct by the Board" (p. 2). It further stated that the reference was not "a personal attack on the Board and its members" (pp. 3-4). We accept these representations of Mr. Scheidt's attorney as to the intent of the remarks in question, and accordingly expunge and

³ U.S. v Marshall, 488 F.2d 1169, 1192 (9th Cir. 1973); Nelson v. People of State of California, 346 F.2d 73, 81 (9th Cir. 1965); Fowler v. Wirtz, 236 F. Supp. 22, 31-32 (D. Fla. 1964).

strike from the record the Order to Show Cause issued on April 13, 1984.⁴

By this ruling we do not necessarily accept counsel's statement that the correctness of Suffolk County's position was "conclusively established" by the issuance of a temporary restraining order (TRO) by Judge Norma Johnson on April 25. We note that, as is common with TRO's, it was issued to preserve the status quo for 10 days, based upon an incomplete record following arguments of counsel. It is not unprecedented for TRO's to be issued under such circumstances, nor is it unprecedented for such TRO's to be vacated when hearings on the merits are conducted later by the presiding judge. Here, however, the hearing on the merits before Judge Gerhard Gesell as the presiding judge, scheduled for May 3, was foreclosed by the dismissal of the suit on May 1 by Suffolk County and Governor Cuomo, following the Commission's order on April 30 vacating the hearing schedule.

Finally, the members of this Board forthrightly reject any insinuations or aspersions which might tend to reflect upon their integrity or professional objectivity, in this or any other adjudicatory proceeding. No administrative judge who is a member of the Licensing Board Panel can be rewarded or punished, either by the Commissioners or

⁴ Had such explanations and disclaimers ever been offered earlier by Mr. Scheidt himself, this matter would long since have been concluded.

by anyone else in NRC, for his or her adjudicatory actions. As administrative judges we are not eligible for nor can we receive annual bonuses or any other remuneration or reward for our services, nor are we subject to punitive action for our decisions. Our objectivity and adjudicatory independence are thus insulated from any agency influence, and we do not propose to allow our integrity to be unfairly impugned at any level.

For the foregoing reasons, we hereby expunge and strike from the record the Order On Attorney to Show Cause Why Disciplinary Action Should Not Be Imposed, issued on April 13, 1984.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD


Marshall E. Miller, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 30th day of May, 1984.